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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

FREDDIE C. TILLER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Illinois Supreme Court has incorrectly interpreted and improperly extended the rule of *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) to include a constitutional prohibition against capital punishment for one who, while possessing the intent to kill, was not shown to have overtly planned the murders or participated in the commission of the fatal acts?

II.

Whether a defendant who did not commit the fatal acts, but who was nevertheless convicted of multiple murders under a theory which requires proof of a culpable mental state, is sufficiently distinguishable from the defendant in *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) to permit his execution consistent with the Eighth and Fourteenth Amendments?

III.

Whether this Court should give further consideration to the rationale for its decision in *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) in light of the fact that it incorrectly concluded that the Illinois death penalty act applies only to persons found to have actually committed the fatal act?

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In The

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

FREDDIE C. TILLER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINION BELOW

Following respondent's convictions in the Circuit Court of St. Clair County, Illinois, and the imposition of sentences of death, the Illinois Supreme Court affirmed two convictions for murder and one for armed robbery; reversed one conviction for armed robbery; vacated two convictions for armed violence; vacated the sentences of death; and remanded this cause with directions. *People v. Tiller*, Ill. S.Ct. No. 53260, (December 17, 1982). The opinion of the Illinois Supreme Court, which is not as yet reported, is reprinted as petitioner's Appendix A.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on December 17, 1982. Petitioner filed a timely petition for rehearing, which was denied by an order entered January 28, 1983. See Appendix B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VIII, provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. XIV, provides, in pertinent part, that:

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

Ill. Rev. Stat. 1979, ch. 38, par. 5-2, provides that:

> § 5-2. When Accountability Exists. A person is legally accountable for the conduct of another when:

(a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or,

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or

(2) The offense in so defined that his conduct was inevitably incident to its commission; or

(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

Ill. Rev. Stat. 1979, ch. 38, par. 9-1(a), provides that:

§ 9-1. Murder-Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Ill. Rev. Stat. 1979, ch. 38, par. 9-1(b)(3) and (6), provide that:

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

* * *

6. the murdered individual was killed in the course of another felony if:

(a) The murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child . . . .

STATEMENT OF THE CASE

A. Introduction—Procedural History.

On the morning of April 30, 1979, respondent Freddie Tiller, Jr., and a co-defendant, Andre Jones, while armed with a brown-handled .22 pistol, went on a robbery and shooting spree in East St. Louis, Illinois. The two robbery victims, Richard Stoltz and Samuel Nersesian, both unarmed, offered no resistance. They were shot to death, each dispatched by bullets to the head. Debra Brown, a mail carrier and unwitting intruder on the robbery of Mr. Nersesian, was shot, once in the chest and once in the mouth, and also killed.

Tiller and Jones were charged by indictment in the Circuit Court of St. Clair County with three counts each of murder, armed robbery, and armed violence. Jones pleaded guilty to three counts of murder and was sentenced to death. The convictions and two of the death sentences were affirmed. *People v. Jones*, No. 53414 December 17, 1982). (Opinion reprinted as Appendix C.) On Tiller's motion, the three counts relating to the crimes against Richard Stoltz were severed, and he was tried by a jury and convicted of all six counts (two counts each of murder, armed robbery, and armed violence) relating to Samuel Nersesian and Debra Brown. The State sought the death penalty. Pursuant to *Ill. Rev. Stat.* 1979, ch. 38, § 9-1(d), a separate jury was chosen for sentencing, and Tiller was subsequently sentenced to death.

On appeal, the Illinois Supreme Court affirmed the murder convictions, and the conviction for armed robbery of Mr. Nersesian. Relying exclusively on this Court's decision in *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the court below reversed the sentences of death.

B. The Facts Underlying The Convictions.

The State's principal witness was Laurie Elem, who lived at 2121 Martin Luther King Drive in East St. Louis with Andre Jones and her three children. On April 30, 1979, at 8:00 a.m., she and Jones left to visit her cousin, Lucy Williams. (Tr. 370-373) Jones carried the murder weapon in his coat pocket that morning, and Ms. Elem testified that it was his custom to travel armed. (Tr. 373, 400, 401)

Tiller was at the Williams' residence when Jones and Ms. Elem arrived. The visit lasted approximately 45 minutes, after which Ms. Elem and Jones left, accompanied by Tiller. (Tr. 371-374, 502-503)

While walking along Bunkham Road, Tiller tried to enlist Ms. Elem's aid in a scheme to rob a dry cleaners. She refused. (Tr. 375-377) Turning off Bunkham Road, Tiller, Jones, and Ms. Elem took a circuitous route heading in the general direction of Ms. Elem's apartment. (Tr. 377) They walked some distance along a railroad track until they came to a brickyard where Ms. Elem noticed an elderly white man loading bricks onto a trailer. (Tr. 378-379) Freddie Tiller then asked Andre Jones for his gun, stating his intention to rob the man in the brickyard, and Jones gave him the gun. (Tr. 378-379, 555-556) The two proceeded toward the man in the brickyard, and Ms. Elem headed away from them toward the street. (Tr. 380)

Richard Stoltz had arrived at the brickyard an hour earlier, and was loading bricks onto a trailer. (Tr. 258, 264, 266-267) Jones and Tiller approached Stoltz, and Tiller drew the pistol and pointed it at him. (Tr. 383) Tiller then shot Richard Stoltz, the bullet entering the brain through the left eye. (Tr. 385, 318-320) When Tiller

and Jones rejoined Ms. Elem on the street, Tiller was carrying the gun, and Jones was carrying a watch and a set of keys. (Tr. 385-387, 409-410) Addressing Tiller, Jones said "Man, you shot the shit out of that honkey," to which Tiller replied "I mean business. He wouldn't up the cash." (Tr. 386-387)

After the shooting at the brickyard, Tiller, Ms. Elem and Jones continued on their way to Ms. Elem's apartment. (Tr. 390) Tiller had given the gun back to Jones who reloaded it, and the two discussed robbing the cleaners across the street from Ms. Elem's apartment. (Tr. 389-390) Tiller again tried to enlist the aid of Laurie Elem, but again Ms. Elem refused. (Tr. 390) Tiller and Jones discussed who would hold the gun, and Tiller stated that he wanted to. (Tr. 391) When they reached the cleaners on King Drive, Jones removed a ski mask from his back pocket. (Tr. 391-392) At this point, Ms. Elem left Tiller and Jones by the cleaners and went home. (Tr. 390)

The Illinois Cleaners, located on Martin Luther King Drive in East St. Louis, Illinois, was owned and operated by Samuel Nersesian and his mother, Helen Nersesian. On the morning of April 30, 1979, Samuel Nersesian was in the store alone. Since he did not survive the day, and since Jones did not testify at Tiller's trial, the only account of what took place there that morning came from Tiller. He testified at trial that he and Jones entered the Illinois Cleaners shortly after Ms. Elem went home. (Tr. 509) After waiting for a customer to leave, Jones drew the gun on Samuel Nersesian and announced a stickup. (Tr. 510) Tiller went to the back of the store and picked up a television set while Jones, still menacing Mr. Nersesian with the gun, searched the drawers behind the counter. (Tr. 510-511, 545) When Tiller came to the front of the store, he observed Debra Brown, a letter carrier

making her deliveries, approaching. (Tr. 512) He put the television down, admonished Jones not to hurt the "mail lady," and left to rejoin Laurie Elem. (Tr. 512-513) On cross-examination, Tiller admitted that he gave no such admonishment regarding Samuel Nersesian:

Q. You didn't say anything about the man?
A. The man was still . . .
Q. The man was dead, wasn't he?
A. Not as I know of, not as I know of.

(Tr. 547)

Tiller was with Ms. Elem for only a few moments before he returned to the Illinois Cleaners, where he retrieved the television, placed it in the back of the mail delivery jeep, and drove off. (Tr. 514) Evidently, both Mr. Nersesian and Ms. Brown were dead at this point.

Tiller and Jones then made a number of trips between the cleaners and Ms. Elem's apartment. When they had finished, the loot consisted of the television, a watch taken from Richard Stoltz, a quantity of cash, and some clothing. (Tr. 393-394, 412-413)

When he left Ms. Elem's apartment, Tiller drove the mail jeep to an abandoned house, where he searched through the mail and recovered a number of income tax refund checks. (Tr. 515) He then drove to his aunt's house where he met a cousin, Annette Simpson, to whom he gave two of the checks, asking that she cash them. (Tr. 515-516) Again, he drove off in the mail jeep, and eventually abandoned it on rural Route 3. (Tr. 516)

Annette Simpson succeeded in cashing a check made out to Charles Union that afternoon. (Tr. 348) Later, she encountered Tiller in downtown East St. Louis, where he told her that the checks were the proceeds of a robbery he had committed that morning in which a man and woman

were killed. (Tr. 350, 358, 364) When that information was confirmed by an independent source, Ms. Simpson went home and burned the other check. (Tr. 352, 358, 361)

The body of Samuel Nersesian was found behind the counter of the Illinois Cleaners by a patron who entered after the robbery. (Tr. 368) He had been shot twice in the head. Both wounds were contact wounds. (Tr. 425-427, 433-435) The partially unclad body of Debra Brown was found in the back of the store. She had been shot once in the chest and once in the mouth. Gunpowder burns around her mouth indicated a shot from close range. (Tr. 322, 323)

C. The Manner In Which The Constitutional Question Arose.

Approximately eight months after oral argument in *People v. Tiller*, this Court decided *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The defendant filed a motion for leave to cite additional authority, and attached a copy of the *Enmund* opinion. The State countered with a motion for leave to file supplemental argument, and attached a memorandum of law concerning the applicability of *Enmund* to the case at bar. In reversing the death sentences, the Illinois Supreme Court found no defect under state law, but relied exclusively on *Enmund*.

REASONS FOR GRANTING THE WRIT

I.

THE JUDGMENT OF THE ILLINOIS SUPREME COURT INCORRECTLY INTERPRETS AND IMPROPERLY EXTENDS THE RULE OF *ENMUND v. FLORIDA*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) TO INCLUDE A CONSTITUTIONAL PROHIBITION AGAINST CAPITAL PUNISHMENT FOR ONE WHO, WHILE POSSESSING THE INTENT TO KILL, WAS NOT SHOWN TO HAVE PARTICIPATED IN THE COMMISSION OF THE FATAL ACTS.

Last year, a majority of this Court concluded that the Eighth Amendment prohibition of cruel and unusual punishment precluded the imposition of the death penalty on a defendant ". . . in the absence of proof that [he] killed or attempted to kill, and regardless of whether [he] intended or contemplated that life would be taken. . . ." *Enmund v. Florida*, ... U.S. ....., 102 S.Ct. 3368, 3379, 73 L.Ed.2d 1140, 1154 (1982). The Illinois Supreme Court now concludes that the constitutional rule announced in *Enmund* extends also to one who "was not shown to have planned or participated in any manner in the killings . . ." *People v. Tiller*, No. 53260 (December 17, 1982), Appendix A at 16-17.

In vacating the sentences of death in *Tiller*, the Illinois Supreme Court relied exclusively on this Court's holding in *Enmund*, and not on any state law ground. However, while purporting to apply *Enmund*, the court below clearly did not follow it. Earl Enmund's conviction was based on a theory of vicarious felony murder, and the gist of the *Enmund* decision is that a defendant may not constitutionally be sentenced to death absent proof of a culpable mental state—the intent to kill or the intent to use lethal force if necessary to effectuate the robbery or a

safe escape. Freddie Tiller is not a felony murderer. He was convicted on the basis of his accountability for intentional murders, a theory which is conceptually distinct from felony murder. The gist of the *Tiller* decision is that the death penalty is constitutionally impermissible absent proof of some overt act contributing to the killing; for example, planning or participating.

The error below is compounded by the fact that, although Tiller was not found to have actually killed or attempted to kill Samuel Nersesian and Debra Brown, he was found to possess the requisite intent. Respondent was charged with murder under *Ill. Rev. Stat.*, 1979, ch. 38, par. 9-1(a)(1):

> (a) A person who kills an individual without lawful justification, commits murder if, in performing the the acts which cause the death:
>
> > (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another. . . .

He was found guilty of the murders, and the convictions were affirmed, under the Illinois accountability statute, *Ill. Rev. Stat.*, 1979, ch. 38, par. 5-2, which provides in pertinent part, that:

> § 5-2. A person is legally accountable for the conduct of another when: . . .
>
> > (c) Either before or during the commission of an offense, *and with the intent to promote or facilitate such commission*, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

(emphasis added). *See* Appendix A at 7. Thus, in affirming the murder convictions, the Illinois Supreme Court held that the evidence established beyond a reason-

able doubt that Tiller, "with the intent to promote or facilitate" the murders, aided and abetted his accomplice in the commission of the offenses. This fact purges Tiller's death sentences of the error found in *Enmund*. Only by grafting onto *Enmund* an additional requirement not mandated by this Court was the court below able to find cause to vacate the death sentences. Furthermore, the sentencing jury was specifically called upon to address the question of Tiller's intent, and found beyond a reasonable doubt that the two murders for which he was convicted "were the result of either an intent to kill more than one person or of separate premeditated acts . . ." *Ill. Rev. Stat.* 1979, ch. 38, par. 9-1(b)(3). The court below did not suggest that this finding lacked support in the record.

The Illinois Supreme Court has had occasion to consider the applicability of *Enmund* in two other recently decided cases: *People v. Ruiz*, No. 53415 (December 17, 1982), decided the same day as *Tiller*; and *People v. Davis*, No. 54276 (January 24, 1983) (opinions reprinted as Appendices D and E). *Ruiz* reflects a correct application of *Enmund*:

> We have detailed above the participation of Luis Ruiz in the three murders involved in this case. In *Enmund v. Florida*, the defendant was found guilty of *felony* murder solely on the basis of his participation in the commission of the felony, robbery. In our case Ruiz was not tried or convicted on the theory of felony murder. We noted above in this opinion that, under our statute, the death penalty cannot be imposed for felony murder unless the defendant actually kills the victim. (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9-1(b)(6)(a).) In our case Ruiz was present throughout the violent episode, actively participated, except for striking a fatal blow, and his conduct was such as to support an inference that he possessed the intent to take the lives of the victims.

Appendix D at 63. The majority opinion in *Ruiz* was authored by Chief Justice Ryan, who dissented in *Tiller*. *Davis* is less clear. There, the court construed *Enmund* as allowing imposition of the death penalty "on a defendant who does not himself kill 'if the likelihood of a killing in the course of a [felony] were so substantial that one should share the blame for the killing if he somehow participated in the felony.' [citation omitted] This is just such a case, and we hold that *Enmund* does not preclude imposition of the death penalty." Appendix E at 111. The author of the *Davis* opinion was Justice Moran, who also dissented in *Tiller*, writing "I fear, too, that the application of *Enmund* to the instant case sets an unfortunate precedent." Appendix A at 19. His fears were confirmed, for in writing *Ruiz* Chief Justice Ryan found it necessary to ignore *Tiller* altogether, while in writing *Davis* Justice Moran was forced to distinguish that case from *Tiller* and *Enmund* for reasons which had nothing to do with the holding of either:

> Also distinguishable from the instant case is this court's recent opinion in *People v. Tiller*, (Dec. 17, 1982), No. 53260. There defendant's death sentence was reversed in light of *Enmund*. However, in *Tiller*, the evidence indicated that defendant was not present when his codefendant murdered one of the two victims. Here defendant was present and it is clear that he must have contemplated that lethal force would be employed by Richard Holman. Finally, the defendant in *Tiller* was convicted of two related murders. The deaths occurred at virtually the same time, in the same place, and arose out of the same incident. In our case, the defendant was convicted of three separate murders.

Appendix E at 111-2. Thus, by its erroneous holding in *Tiller* that *Enmund* requires proof of planning or participating in the fatal acts, the Illinois Supreme Court

was forced, only one month later, to add the further requirement of close proximity to the scene at the time of the killing. What further additions to *Enmund* may become necessary in the future in order to ameliorate the error in *Tiller* must be a matter of grave concern to this Court, and, indeed, one warranting the issuance of a writ of certiorari.

II.

ALTHOUGH RESPONDENT DID NOT COMMIT THE FATAL ACTS, HE WAS NEVERTHELESS CONVICTED OF MULTIPLE MURDERS UNDER A THEORY WHICH REQUIRES PROOF OF A CULPABLE MENTAL STATE, AND THUS, THIS CASE IS SUFFICIENTLY DISTINGUISHABLE FROM *ENMUND v. FLORIDA*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) TO PERMIT RESPONDENT'S EXECUTION CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS.

In writing for the majority in *People v. Ruiz*, Chief Justice Ryan noted that "In *Enmund v. Florida*, the defendant was found guilty of *felony* murder solely on the basis of his participation in the commission of the felony robbery. In our case, Ruiz was not tried or convicted on the theory of felony murder." Appendix D at 63. Neither was Freddie Tiller. Tiller was charged under sub-paragraph (a)(1) of the Illinois murder statute with intentional murder, and, even though he was not the "triggerman," his convictions were affirmed based on paragraph 5-2(c) of the accountability statute, because he was found to possess the requisite intent. He was not the vicarious felony murderer that Earl Enmund was.

Neither was he a defendant who, like Enmund, ". . . somehow participated in a robbery where a murder occurred . . ." *Enmund*, ... U.S. ....., 102 S.Ct. at 3374, 73 L.Ed.2d at 1148. The evidence established that prior to the

robbery/murders at the Illinois Cleaners, Tiller asked Jones to give him the gun for the purpose of robbing Richard Stoltz. He then shot and killed him because "he wouldn't up the cash." It was Tiller who suggested robbing the Illinois Cleaners, and it was Tiller who tried to get Laurie Elem to assist. He watched as Jones reloaded the gun, and then told Jones that he wanted to hold the gun during the robbery. As the court below noted, the evidence supported the conclusion that the victims were murdered as part of the robbery scheme, to prevent them from identifying Tiller and Jones. Appendix A at 7.

This Court, in *Lockett v. Ohio*, 438 U.S. 596 (1978) made the observation that the states ". . . have the authority to make aiders and abettors equally responsible, as a matter of law, with principals . . ." 438 U.S. at 602. That a convicted murderer may constitutionally be executed, even though he was not the "triggerman," is therefore beyond dispute. The emphasis in both *Enmund* and *Lockett* is that the sentencing decision must be individually tailored, and must reflect the degree of the defendant's culpability. *Enmund* establishes the minimum: that there must be proof of a culpable mental state regarding the murders in order to satisfy the Eighth Amendment. With respect to this crucial element, *Tiller* bears no resemblance to *Enmund*.

As this Court noted, only a few of the jurisdictions which have death penalty statutes restrict the imposition of that punishment to persons who actually commit the fatal act. *Enmund*, ... U.S. ....., 102 S.Ct. at 3373, 73 L.Ed.2d at 1147-48, n. 9. In Illinois alone, three cases involving death sentences for "non-triggermen" have been decided since December, 1982. Accepting this case for review will provide this Court with an opportunity to further define, by contrast, the rule of *Enmund*.

III.

FURTHER CONSIDERATION OF THE RATIONALE FOR THE DECISION IN *ENMUND v. FLORIDA*, ... U.S. ....., 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) IS NECESSARY IN LIGHT OF THE FACT THAT THIS COURT INCORRECTLY CONCLUDED THAT THE ILLINOIS DEATH PENALTY ACT APPLIES ONLY TO PERSONS FOUND TO HAVE COMMITTED THE FATAL ACT.

In deciding the Eighth Amendment question presented in *Enmund*, this Court observed that its judgment "'should be informed by objective factors to the maximum possible extent.' [*Coker v. Georgia*, 433 U.S. 584, 592 (1977)]." Toward that end, this Court examined, as it did in *Coker*, "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made. . . ." *Enmund*, ... U.S. ....., 102 S.Ct. at 3372, 73 L.Ed.2d at 1146. Two of the conclusions reached by the majority as a result of this analysis bear further consideration in light of the judgment of the Illinois Supreme Court in the case at bar.

The first is this Court's conclusion that the Illinois death penalty act precludes capital punishment for all except those found to have actually killed the victim. *Enmund*, ... U.S. ....., 102 S.Ct. at 3373, 73 L.Ed.2d at 1148, n. 9. In reaching this conclusion, the Court looked to the felony murder provision and aggravating factor (b)(6). *Ill. Rev. Stat.* 1979, ch. 38, pars. 9-1(a)(3), (b)(6).[1] How-

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[1] These sections provide, in pertinent part:

§ 9-1. Murder-Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: . . .

(Footnote continued on following page)

ever, in so doing, this Court overlooked the intentional murder provision and aggravating factor (b)(3) which, when read in conjunction with the accountability statute, *Ill. Rev. Stat.* 1979, ch. 38, par. 5-2 can produce a different result.[2] Indeed, subsequent to this Court's decision in

[1] *continued*

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child.

[2] *Ill. Rev. Stat.* 1979, ch. 38, pars. 9-1(a)(1), (b)(3), and 5-2(c), provide as follows:

§ 9-1(a). A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another . . .

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: . . .

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is

(Footnote continued on following page)

Enmund, the Illinois Supreme Court affirmed the imposition of death sentences on two defendants, based on aggravating factor (b)(3), because they had been held accountable for intentional murders; *People v. Ruiz, supra*, and *People v. Davis, supra*. It bears repeating at this point that Freddie Tiller was found guilty of multiple murders, and was sentenced to death, on the same basis. Perhaps more important, though, is the fact that the result reached in *Enmund* was based, at least in part, on a conclusion regarding the scope and effect of the Illinois death penalty act that was demonstrably incorrect.

The second point addressed by this Court in *Enmund* which warrants further consideration is the conclusion that sentencing juries have almost universally rejected the death penalty for Enmund-type defendants. This Court found that of the 796 inmates on death row as of October 1, 1981 (among them, Freddie Tiller), only Enmund and two others had been sentenced to die "absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim." *Enmund*, ... U.S. ....., 102 S.Ct. at 3375-3376, 73 L.Ed.2d at 1150. Thus, if the Illinois Supreme Court is correct in holding that *Enmund* precludes

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[2] *continued*

substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or . . .

§ 5-2. A person is legally accountable for the conduct of another when:

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

the death penalty for Freddie Tiller, then the ranks of Enmund-type defendants swell by 33 percent, from 3 to 4. Future state court decisions relying on *Tiller* may enlarge the ranks even more, and, at some point jeopardize the whole foundation for the *Enmund* rule.

It is with this dilemma in mind that petitioners urge this Court to further consider and clarify its holding in *Enmund* by issuing a writ of certiorari to the Illinois Supreme Court in the case at bar.

CONCLUSION

WHEREFORE, petitioners, the People of the State of Illinois, pray that this Court issue a writ of certiorari to the Supreme Court of Illinois and, upon consideration, reverse the decision of that court thereby reinstating the death sentences given respondent.

Respectfully submitted,

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No. 82-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

VS.

FREDDIE C. TILLER, JR.,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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APPENDIX A

Docket No. 53260—Agenda 2—November 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. FREDDIE TILLER, Jr., Appellant.

JUSTICE GOLDENHERSH delivered the opinion of the Court:

Defendant, Freddie C. Tiller, Jr., with a codefendant, Andre Jones, was indicted in the circuit court of St. Clair county for three counts of murder (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(a)(1)), three counts of armed violence (Ill. Rev. Stat. 1979, ch. 38, par. 33A-2), and three counts of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18-2(a)). Jones subsequently pleaded guilty to three counts of murder and was sentenced to death. On appeal Jones' convictions and two of the death sentences were affirmed. *People v. Jones* (Nov. 17, 1982), No. 53414.

The victims of the murders were Samuel Nersesian, Debra Brown, and Richard Stoltz. Prior to trial defendant filed a motion "to amend the indictment" and requested that the three counts concerning Stoltz be severed on the ground that they related to an occurrence separate from the offenses involving Nersesian and Miss Brown. The motion was allowed, and the People elected to proceed against defendant on the six counts involving Miss Brown and Nersesian. Defendant was convicted of two counts of murder, two counts of armed robbery, and two counts of armed violence. A second jury was impaneled and found that one or more of the factors set forth in the statute (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(d)) existed and, following the consideration of aggravating and mitigating factors, found that there were no mitigating factors sufficient to preclude a sentence of death. Defendant was sentenced to death, and the sentences were stayed (73 Ill. 2d R. 609(a)) pending direct appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 73 Ill. 2d R. 603).

At trial, Laurie Elem testified that she and her three children had lived with Andre Jones for approximately two months prior to the date of the occurrences in question. On the morning of April 30, 1979, she and Jones left their apartment and walked to the home of her cousin, Lucy Williams. Jones was carrying a .22-caliber revolver. At the Williams residence they met defendant, who had spent the night there. Defendant is also a cousin of the witness. After a brief visit, Jones, Elem, and defendant left the Williams apartment together. As they walked they drank beer and a bottle of "brass monkey," described as being a kind of wine. There was some discussion of robbing the Illinois Cleaners, a cleaning shop located across the street from the apartment occupied by Jones and Elem. Meanwhile, as they approached another cleaning shop, defendant asked Elem to go into the cleaners and request permission to enter the back room to find her clothes. While there, Elem was to unlock the back door so that defendant and Jones could enter to rob the proprietor of the store. Elem refused this request and the three continued walking. They walked for some distance along a railroad track and came to a brickyard where they saw a man, Richard Stoltz, loading bricks onto a trailer. Defendant asked Jones for the revolver Jones was carrying, stating his intention to rob the man. Jones gave him the weapon. The two men approached Stoltz, and Elem walked away toward the street. Elem turned and saw defendant pointing the gun at Stoltz. She saw Stoltz remove something from his arm while shaking his head sideways. Elem turned her head from the scene and then heard a shot. She started running, and defendant caught up with her carrying the gun in his hand. Jones soon rejoined them, carrying a watch and a set of keys. Jones told defendant, "Man, you shot the shit out of that honky," to which defendant replied, "I mean business. He wouldn't up the cash." Jones then retrieved the gun from defendant, replaced the used cartridge, and put the gun in his pocket. The three proceeded towards the Jones and Elem apartment. The two men discussed robbing the Illinois Cleaners and defendant again tried to get Elem to help, suggesting a scheme similar to the one

proposed for robbing the cleaners they had passed earlier. Elem again refused. Defendant and Jones discussed who would hold the gun and defendant stated that he wanted to. When they reached Illinois Cleaners Jones removed a ski mask from his back pocket. Elem left Jones and defendant near the cleaners, crossed the street, and went home. Approximately 15 to 20 minutes after she left Jones and defendant, Jones came to her apartment, but soon left again. Defendant then came in, but he too left after a short time. The two men made a number of trips in and out of the apartment, and during one of these trips defendant brought in a television set and Jones brought in some money and some clothing. Elem did not see defendant again until later that evening when he returned to the apartment. During this visit defendant asked Jones, "Did you put the mail lady up?" When defendant finally left the apartment that evening he had with him the watch taken from Stoltz and a share of the money obtained from the robbery of the cleaners.

Defendant testified that on April 30, 1979, between 8 a.m. and 8:30 a.m., Jones, Elem, and defendant set out together, walking toward the Jones and Elem apartment. They walked and drank some beer and a wine-like alcoholic beverage. Sometime that morning defendant ingested five pink pills that he had bought from someone on the street. Defendant did not know the contents of these pills. Defendant stated that as a result of the alcoholic beverages and the pills he was unable to remember clearly what happened that day. Defendant testified that he and Jones and Elem walked until they came to the brickyard where Stoltz was loading bricks. Defendant said to Jones, "Let's go make some money," intending that he and Jones help the man load the bricks for pay. As they approached Stoltz, Jones drew a gun and pointed it at Stoltz. This was the first time defendant had seen the gun. Jones ordered Stoltz to give him something and Stoltz denied having it. Defendant began running away from the scene and heard a gunshot. He denied seeing the actual shooting or ever possessing the weapon. The three reunited and continued walking until they reached the

alley beside the Illinois Cleaners. Defendant and Jones stopped, but Elem walked on past the cleaners. Jones said he had some clothes in the cleaners so the two men entered the shop. Jones placed a cleaning ticket on the counter, and when the proprietor picked it up, Jones drew the gun and announced a "stick-up." Jones and defendant went behind the counter, and while Jones was pointing the gun at the proprietor, defendant took a television set from the back of the shop. Defendant carried the television set to the front of the shop and set it down. He observed that Jones was holding the gun against the proprietor and was searching the drawers behind the counter. Defendant began to leave the cleaners without the television set when he observed a postal mail carrier approaching the shop. Before leaving, defendant twice told Jones not to hurt the "mail lady." Defendant left the cleaners and passed by a "gas company car" parked at the corner. Defendant waved a "peace sign like" to the occupants of the car. Defendant caught up with Elem, and the two of them went to her apartment. After a few minutes defendant left the apartment and returned to the cleaners. Not seeing anyone inside, defendant opened the front door, reached inside, and picked up the television set from its position near the door. Defendant had not returned for this purpose. Defendant placed the television set in a "mail Jeep" parked nearby and drove to Elem's apartment, where he left the television set. Defendant drove the mail Jeep to an abandoned house and searched through the undelivered mail. He drove the mail Jeep to his aunt's home and while there he talked with Annette Simpson. He showed her a number of income tax refund checks which he had found among the undelivered mail and gave her two of them. He drove the mail Jeep around a while longer and eventually abandoned it. Later that same day defendant saw Simpson and asked if she had cashed any of the checks he had given her. Sometime between 5 p.m. and 6 p.m. defendant returned to the Jones and Elem apartment. Both Jones and Elem were at the apartment. Defendant asked Jones what had happened at the cleaners but could not remember Jones answering. Defendant received some

curtains which had been taken from the cleaners and then left the apartment. Defendant denied asking the question, "Did you put the mail lady up?" and denied receiving any money from the robbery of the cleaners.

Calvin Randolph, an Illinois Power Company employee, testified that he was driving past Illinois Cleaners at approximately 10:30 a.m. on April 30, 1979, when he noticed two men, one of whom was wearing a ski mask, standing in the alley adjacent to the cleaners. Randolph momentarily stopped his car and then moved it to a position from which he could observe the entrance to the cleaners. Randolph observed defendant walking away from the cleaners. As defendant passed Randolph's car he looked in and waved a "peace sign" to Randolph. Defendant continued down the street until he was out of sight. Soon thereafter Randolph left the scene. Randolph testified that he had seen no mail truck and heard no shot.

Annette Simpson testified that sometime between 9 a.m. and 10 a.m., April 30, defendant contacted her at the house of a relative. Defendant gave her two checks and told her he had a mail truck outside. Simpson asked no questions at that time. Later that day she cashed one of the checks. At about 3 p.m. she saw defendant and he mentioned the robbery and the killing at the cleaners. Simpson testified that defendant told her he had killed the "mail lady and the cleaners man" and stated that she did not believe him at that time. Later that day she heard about the robbery and killings from someone else. She subsequently burned the other check which defendant had given her.

The medical testimony showed that Stoltz had received a gunshot wound to the left eye and that the cause of death was brain damage. Nersesian had received two gunshot wounds to the skull, both of which were contact wounds. The cause of Nersesian's death was brain damage resulting from the two head wounds. Miss Brown had received two gunshot wounds, one slightly right of the center of the chest and another in the mouth. The cause of death was damage to the heart. Gun powder marks indicating a shot from close range were found around her

mouth. A ballistics expert testified that the bullet fragments removed from the three bodies could have been fired from the weapon identified as the .22-caliber revolver carried by Jones on April 30, 1979.

At the close of the evidence, the jury was instructed, *inter alia*, on the felony-murder doctrine and the theory of accountability. The jury returned general verdicts finding defendant guilty on all of the six counts charged.

The People gave notice that they intended to seek the death penalty on the ground that defendant had been convicted of murdering two persons. (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(b)(3).) A new jury was impaneled for the sentencing hearing. The record fails to reflect the reason a separate jury was chosen; the court had earlier denied defendant's motion for a separate jury. During *voir dire* the court informed the new jury that the issue of whether defendant murdered two people had already been decided. The evidence introduced at the first phase of the sentencing hearing consisted of a certified copy of the murder convictions and the testimony of the pathologists who performed the autopsies on Nersesian and Miss Brown. At the conclusion of this first phase of the sentencing hearing the jury determined that defendant had attained the age of 18 or more at the time he committed the offense of murder and that he had been convicted of murdering two or more individuals. After receiving information in aggravation and mitigation the jury decided that there were no mitigating factors sufficient to preclude a sentence of death. (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(g).) The court sentenced defendant to death for the murders of Samuel Nersesian and Debra Brown.

We consider first defendant's contention that he cannot be held liable for Jones' actions against Miss Brown because he was not present when she was shot and because there was no showing that he encouraged or aided Jones in the commission of the offenses against her. In support of this contention, defendant asserts that the undisputed testimony shows that he disassociated himself from any "common criminal purpose" towards

her by leaving the cleaners and admonishing Jones not to hurt her. We do not agree. There is ample evidence to support defendant's conviction of the robbery and murder of Nersesian. The jury had before it evidence to support the conclusion that defendant and Jones planned the robbery and that Miss Brown was murdered to prevent her from identifying Jones and defendant as the robbers of Nersesian. As such, her murder was in furtherance of the robbery, and defendant is accountable for his accomplice's act. Even if the jury believed that, as he left the cleaners, defendant warned Jones not to hurt Miss Brown, he could nevertheless be accountable for her murder. Any act committed by his accomplice Jones in furtherance of the robbery of Nersesian is attributable to defendant. *People v. Brendeland* (1957), 10 Ill. 2d 469, 472.

Defendant contends that his alleged admonishment to Jones not to hurt Miss Brown is a "critical factor indicating that [he] did not share any common criminal purpose as to her * * *." Defendant's argument is essentially that he withdrew from the robbery when he left the cleaners due to his admonition to Jones regarding Miss Brown. This argument, which apparently is premised on subsection (c)(3) of section 5-2 of the Criminal Code of 1961, must fail. The statute provides:

> "[A person is not accountable under this section if]
>
> (3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense." (Ill. Rev. Stat. 1979, ch. 38, par. 5-2(c)(3).)

Defendant's actions upon leaving the cleaners hardly vitiates his participation in the commission of the robbery, and certainly does not absolve him from liability for the murder of Miss Brown. Considering his appar-

ent knowledge of the fact that Jones might harm her, it is essential that the record show some affirmative act which would have deprived his prior efforts of their effectiveness. A similar set of facts was presented in *People v. Tyler* (1979), 78 Ill. 2d 193. In that case the defendant and his two confederates set out to burglarize a house. Upon encountering the woman who lived there, one of the defendant's confederates took the woman to a back bedroom and raped her. Although the defendant did nothing to facilitate the offense, he was held accountable for the rape for the reason that he was aware of the crime his confederate was committing and "did nothing to disassociate himself from the occurrence * * *." (78 Ill. 2dd 193, 197; see also *People v. Hubbard* (1973), 55 Ill. 2d 142; *People v. Brown* (1962), 26 Ill. 2d 308.) Here, as in *Tyler*, defendant was aware of another crime that was going to occur due to the commencement of the robbery, but did nothing to prevent the crime. A mere statement of disapproval of his accomplice's intended acts is insufficient to exonerate defendant from liability for the crimes against Miss Brown.

Defendant next argues that the conviction for the armed robbery of Miss Brown must be reversed because no armed robbery was proved. Defendant asserts that he cannot be held accountable for the armed robbery of Miss Brown because any force directed at her was not for the purpose of obtaining property through force or intimidation. To sustain a charge of armed robbery it is essential that the robber use violence or fear of violence as the means to take property in the control of the victim. *People v. Smith* (1980), 78 Ill. 2d 298, 302-03; *People v. Braverman* (1930), 340 Ill. 525, 531.

The evidence does not show beyond a reasonable doubt that the violence exerted in this case was used as a means to take the mail Jeep. A more severe penalty is imposed for robbery than for theft because a great danger exists that the robber's threat of force or violence will lead to death or great bodily harm. Taking advantage of an existing threat, where that threat was

not delivered to persuade the victim to release control of property; creates no additional danger of great bodily harm. (See *People v. Park* (1976), 34 Ill. App. 3d 894; *Woods v. Linghan* (5th Cir. 1981), 648 F.2d 973, 978.) It is not clear from the record what transpired in the cleaners, but there is no evidence to show that the force exerted against Miss Brown was for the purpose of depriving her of the mail truck or the mail in it. We conclude that the conviction for the armed robbery of Miss Brown must be reversed.

Defendant contends that he was denied a fair trial due to the admission of evidence of other crimes. The People argue that the evidence of the Stoltz murder was admissible for the purpose of showing motive, *modus operandi*, intent, and identity. Defendant argues that, even if it was admissible on those grounds, the prejudicial effect outweighed the probative value, and moreover the People did not limit the evidence admitted to that absolutely necessary to support its case on those issues.

Where evidence of other crimes is used solely to suggest that because a defendant has committed other crimes he is more likely to have committed the crime with which he is charged, it is inadmissible. (*People v. Lehman* (1955), 5 Ill. 2d 337, 342.) Evidence of other crimes is admissible, however, for purposes other than to show propensity to commit crime. (5 Ill. 2d 337, 343; *People v. Dewey* (1969), 42 Ill. 2d 148, 157; *People v. Cole* (1963), 29 Ill. 2d 501, 503.) Here, the evidence of the earlier robbery tended to show that defendant was probably aware that the cleaners would be robbed and supported the inference that defendant and Jones robbed the cleaners pursuant to an agreed plan. Evidence of other crimes is admissible to show criminal intent (*People v. McDonald* (1975), 62 Ill. 2d 448, 455), and the evidence of the robbery and murder of Stoltz was admissible for this purpose.

Defendant argues that even if the evidence of Stoltz' murder was admissible for a proper purpose, the preju-

dicial effect clearly outweighed the probative value, and thus the circuit court abused its discretion in admitting the evidence. Defendant argues that the evidence was "gory" and must have had extreme prejudicial effect on the jury. The evidence was gruesome because the crime was gruesome. We cannot say that the circuit court abused its discretion in considering the probative value of the evidence on the issue of intent.

Citing *People v. Lindgren* (1980), 79 Ill. 2d 129, 139, defendant argues that the People may not introduce evidence of other crimes if it has other evidence probative of the issues for which it seeks to introduce the evidence. Defendant's reading of our decision in *Lindgren* is inaccurate. In *Lindgren*, in order to show that the defendant was in the same area where the crime was committed at approximately the same time, the prosecution elicited testimony from a witness concerning a fire started by the defendant that same night. This court held it was error to permit the introduction of the testimony about the arson when it only served to establish time and place proximity of the defendant, especially when the witness could have established the same facts without reference to the crime of arson. Here, however, the evidence was used to prove the intent of defendant, the critical issue in this case. The prosecution is not precluded from presenting evidence of other crimes for a proper purpose merely because it had some other evidence on that point.

Defendant next asserts that even if evidence of the armed robbery of Stoltz was admissible, the circuit court committed reversible error in failing to limit the evidence of any other crimes to that which was absolutely necessary to support its case on the issues for which the evidence was admitted. Defendant argues that the detailed testimony concerning the results of the autopsy of Stoltz and the testimony of Stoltz' wife were presented to the jury solely to arouse their passions. Defendant also asserts that the fact Stoltz died of his injuries was not at all relevant to the case. Defendant

argues that *People v. Lindgren* and *People v. Nickolopoulos* (1962), 25 Ill. 2d 451, taken together; stand for the proposition that when evidence of other crimes is admitted to prove identity, intent, or *modus operandi*, the evidence should be strictly limited to what is necessary to prove that point so that prejudice can be avoided.

While we do not disagree with this proposition, we find no reversible error in the admission of this evidence. The testimony of Stoltz' wife was used to show that Stoltz was robbed as well as murdered, and thus was necessary to prove that fact. The detailed testimony concerning Stoltz' wounds and the fact that he died from those wounds was irrelevant to prove defendant's intent with regard to the robbery of Nersesian. It did not, however, introduce anything new to the jury, but merely corroborated what the jury must have already surmised about the extent of Stoltz' wound.

Defendant contends next that, without basing his opinion on the evidence, the State's Attorney improperly accused him of lying and that during closing argument he improperly stated his opinion as to the guilt or innocence of the defendant. A prosecutor may state his opinion that a defendant is lying if the statement is based on the evidence. (*People v. Weaver* (1959), 18 Ill. 2d 108; 115; *People v. Sinclair* (1963), 27 Ill. 2d 505, 509; see *People v. Weathers* (1975), 62 Ill. 2d 114, 120.) Here, the State's Attorney's statement was based on the many prior inconsistent statements with which defendant was confronted on cross-examination and on other evidence which made defendant's testimony incredible. A prosecutor may not give his own opinion as to the guilt or innocence of the accused (*People v. Monroe* (1977), 66 Ill. 2d 317, 324) unless the prosecution states, or it is apparent, that the opinion is based solely on the evidence. The prosecutor stated in closing argument:

> "I know I think I know who killed Sam Nersesian, who shot them and killed them, and Debra Brown. You know who it was, Andre Jones and Freddie Tiller. That is who did it."

Taken out of context, the statement might appear to state the prosecutor's opinion as to the guilt or innocence of the defendant. But the prosecutor went on to say:

> "And Mr. Hamman is going to get up here and argue there is no proof that my client shot anybody or killed anybody. I would answer that in a little phrase, common law pleading, I demur. It means so what."

The State's Attorney went on to explain that, even without proof that defendant pulled the trigger in the two murders for which he was on trial, he was still guilty because of the law of accountability. When the State's Attorney's statement is read in its entirety, it is apparent that his opinion regarding defendant's guilt was based on the evidence presented in the case and not his own personal beliefs.

Defendant also argues that it is improper to impeach the integrity of defense counsel, citing, *inter alia*, *People v. Monroe* (1977), 66 Ill. 2d 317, 324. While we agree with this statement of the law, we disagree that the State's Attorney tried to impeach the integrity of defense counsel. The prosecutor stated in closing argument:

> "I would say this to Mr. Hamman [defense counsel], he should come here and explain to you at the outset of his argument his reason for not being able to say to you, my client told you under oath the truth, the whole truth, and nothing but the truth so help him God. Have him explain that, the honesty of his client."

It would appear that the prosecution was not impeaching the integrity of defense counsel with this statement, but was suggesting that if defense counsel did not take a particular course of action in his closing argument, it would bolster the prosecution's argument that the defendant was lying on the witness stand.

Defendant also complains of several characterizations made in the State's Attorney's closing argument. The prosecutor explained to the jury that there is a biological hierarchy to the life forms on Earth, ranging from man to amoeba. He stated that man has elevated himself to a plateau above the animals because man, through technology, has eliminated survival of the fittest, but animals must still kill to survive. Criminals, however, are lower than animals because they kill without reason. He explained that there is a hierarchy among criminals, and explained how each different crime committed by the defendant elevated him to a higher level of repugnancy on the criminal hierarchy. The State's Attorney also characterized the three murders as a holocaust, similar to the Nazi holocaust depicted in a television show broadcast the night before closing arguments were made. These statements constitute error. In *People v. Elder* (1962), 25 Ill. 2d 612, 614-15, this court held that characterizing the defendant as an "animal" did not constitute reversible error when the statement was supported by the complaining witness' description of the rape and accompanying deviate sexual acts and no objection was interposed at trial. The court noted its disapproval of the use of invective statements, however, even when they are based on the evidence. In this case, the State's Attorney's statements could be said to be based on the evidence, but the statements were not relevant to the defendant's guilt or innocence and could only have been used to inflame the jury's passions and prejudice them against defendant. Where statements made in closing argument serve no purpose except to inflame the jury, the statements constitute error. *Earll v. People* (1881), 99 Ill. 123, 135; see *People v. Smothers* (1973), 55 Ill. 2d 172, 176.

The error, however, does not warrant reversal of the judgments. "[I]mproper remarks generally do not constitute reversible error unless they result in substantial prejudice to the accused." (*People v. Baptist* (1979), 76 Ill. 2d 19, 29.) Here, as in *Baptist*, the evidence of guilt

was combined with a highly incredible defense and the defendant's inconsistent testimony. Under these circumstances the prosecutorial indiscretion shown does not constitute reversible error.

Defendant next contends that the method used to select the jury deprived him of the right, under the sixth and fourteenth amendments, to a fair trial by an impartial jury. Although a new jury was later chosen for sentencing, defense counsel's request for separate juries at trial and sentencing was originally denied, and *voir dire* examination was conducted as though the veniremen would be responsible for sentencing defendant. In accordance with the guidelines established in *Witherspoon v. Illinois* (1963), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, the veniremen were asked whether they had any scruples against imposing the death penalty. The People excused some jurors peremptorily who indicated they had such scruples, and others were challenged for cause. Defendant claims that the exclusion of prospective jurors for cause pursuant to *Witherspoon* and the exclusions resulting from the two peremptory challenges made by the prosecution produced a jury biased in favor of conviction. The theory of the "conviction-prone" jury has been repeatedly rejected by this court (*People v. Gaines* (1981), 88 Ill. 2d 342, 358; *People v. Lewis* (1981), 88 Ill. 2d 129, 147; and cases cited therein) and nothing argued or cited by defendant presents reason to depart from these holdings. Defendant also specifically contests the exclusion of one prospective juror for cause on the ground that, as required by *Witherspoon*, her comments failed to demonstrate unequivocal opposition to the imposition of the death penalty. It is unnecessary to determine whether the particular exclusion objected to by defendant falls within the limitations of *Witherspoon*, since those limitations do not affect the validity of convictions. (See *People v. Lewis* (1981), 88 Ill. 2d 129, 147; *Adams v. Texas* (1980), 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521.) After examining the transcript of the *voir dire* proceedings

we find no basis to conclude that the jury chosen was incapable of impartiality on the issue of guilt and that defendant's convictions should be reversed on the ground that he was deprived of his constitutional right to trial by an impartial jury.

Defendant next contends that his convictions for armed violence must be vacated because his convictions for armed robbery and armed violence were based on the same act, taking property from the victim while armed with a dangerous weapon.

Section 33A—2 of the Criminal Code of 1961 provides:

> "Sec. 33A-2. Armed violence—Elements of the offense. A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law." (Ill. Rev. Stat. 1979, ch. 38, par. 33A-2.)

The armed violence counts charged that defendant, "while armed with a dangerous weapon, a gun, a category 1 weapon. * * * took property * * * from the presence of * * * by the use of force in violation of paragraph 33A-2, chapter 38. Illinois Revised Statutes." The armed robbery counts charged that defendant "while armed with a dangerous weapon, a gun, took property * * * from the presence of * * * by the use of force, in violation of paragraph 18-2(a), chapter 38, Illinois Revised Statutes." In view of our holding that the conviction for the armed robbery of Debra Brown must be reversed, there is no underlying felony to sustain the conviction for armed violence and the judgment must be reversed.

Subsequent to the argument of this case we decided *People v. Donaldson* (1982), 91 Ill. 2d 164. We said in *Donaldson*:

> "In the absence of a clear legislative expression to the contrary we hold that multiple convictions for both armed violence and the underlying felony cannot stand where a single physical act is the basis for both charges." (91 Ill. 2d 164, 170.)

Accordingly, the conviction for the armed violence against Nersesian is vacated.

In his opening brief defendant contends that a death sentence imposed on a theory of accountability is violative of the eighth and fourteenth amendments to the United States Constitution, Article I, section II, of the Illinois Constitution of 1970, and the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 1-1 *et seq.*). Following the decision in *Enmund v. Florida* (1982), ... U.S. ..... , 73 L. Ed. 2d 1140, 102 S. Ct. 3368, defendant obtained leave to cite additional authority. He argues that the People's theory of the case, and the theory on which the jury was instructed, was that defendant was accountable for the Brown and Nersesian deaths. He argues that the evidence fails to show any plan or intent to kill either Nersesian or Miss Brown or that he performed the acts which resulted in their deaths. He contends that his position is no different than that of Enmund in that he did not plan or participate in the deaths of the robbery victims. In their response the People argue that "even if defendant lacked the requisite intent to murder Samuel Nersesian and Debra Brown sufficient aggravating factors were present to allow imposition of the death penalty without offending *Enmund*."

In *Enmund* the court said:

> "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not." ..... U.S. ..... , ... , 73 L. Ed. 2d 1140, 1151, 102 S. Ct. 3368, 3376-77.

Unlike the defendant in *People v. Ruiz* (Nov. 17, 1982), No. 53-115, defendant was not shown to have planned or in any manner participated in the killings,

and under the authority of *Enmund* the death sentences must be vacated.

For the reasons stated, the judgments of the circuit court finding defendant guilty of the murders of Samuel Nersesian and Debra Brown and the armed robbery of Samuel Nersesian are affirmed, the judgments of conviction for armed robbery and armed violence as to Debra Brown are reversed, and the judgment of conviction for armed violence as to Samuel Nersesian is vacated. The cause is remanded to the circuit court of St. Clair County for the imposition of sentences other than death for the convictions for murder and for the imposition of sentence on the conviction for armed robbery.

Affirmed in part and reversed in part and vacated in part; cause remanded, with directions.

JUSTICE MORAN, dissenting:

I disagree with that portion of the majority opinion which holds that under the authority of *Enmund v. Florida* (1982). ..... U.S. ..... , 73 L. Ed. 2d 1140, 102 S. Ct. 3368, defendnat's death sentences must be vacated. It seems to me that the majority places upon *Enmund* too narrow an interpretation. Further, the circumstances in that case are clearly distinguishable.

In *Enmund*, the two victims were shot to death by defendant's codefendants during the course of a robbery. The murders occurred only after one of the victims shot and wounded a codefendant. Thus, there is every reason to believe that the murders were an unplanned and spontaneous reaction. Defendant Enmund participated in the offense to the extent that he drove the getaway car. He was not present at the scene of the crime. The Florida Supreme Court found no evidence that he planned the robbery.

In the instant case, Elem testified that defendant suggested the idea of robbing the proprietor of a cleaning store. Although defendant's testimony differed considerably on this point, the jury was not required to believe him. There was evidence from which the jury could infer that defendant participated in planning the offense. Further, unlike Enmund, he was present, at least part of the time, during the commission of the offense. The evidence indicates that he stole the "mail lady's" jeep and a television set. Clearly, defendant participated in the offense to a greater degree than was the case for Enmund.

More importantly, Elem testified that defendant shot Stoltz just prior to the cleaning-shop robbery. That shooting took place during the course of robbing the victim. Shortly thereafter, defendant and Jones entered the cleaning shop, and with the intent of robbing someone. The majority notes defendant's "apparent knowledge of the fact that Jones might harm [the mail lady]." (Slip op. at 9.) It is difficult to believe that defendant did not anticipate that life would be taken or lethal force employed.

As a majority of the Supreme Court stated, in reversing Enmund's death sentence: "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." (*Enmund v. Florida* (1982), ... U.S. ..... , ... , 73 L. Ed. 2d 1140, 1153, 102 S. Ct. 3368, 3378.) In the instant case, I cannot help but conclude that there was a substantial likelihood that a killing would occur. Under these circumstances, *Enmund* should not be read to preclude imposition of the death sentence.

Further, it should be noted that defendant in the instant case received the death penalty for murdering two or more individuals. Thus, contrary to *Enmund*, the sentence was not imposed solely because an unintended death occurred during the commission of a felony. See *People v. Ruiz* (Dec. 17, 1982), No. 53415, slip op. at 16.

I fear, too, that the application of *Enmund* to the instant case sets an unfortunate precedent. It will be difficult indeed to impose the death penalty for any unwitnessed murder in which defendant is not the actual "triggerman." This is so despite the fact that defendant just murdered one victim during the course of a separate robbery, and although he was present during, and actively participated in, the offense in question. The position adopted by the majority benefits those defendants who are careful not to leave any witnesses to the crime.

For these above-related reasons, I would affirm the imposition of the death penalty in this case.

CHIEF JUSTICE RYAN joins in this dissent.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 28, 1983

Hon. Neil F. Hartigan
Attorney General
Criminal Justice Division
188 W. Randolph St.
Chicago, IL 60601

No. 53260 — People State of Illinois, appellee, vs. Freddie C. Tiller, appellant. Appeal, Circuit Court (St. Clair).

The Supreme Court today DENIED the Petition for Rehearing filed in the above entitled cause.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

APPENDIX C

Docket No. 53414—Agenda 2—September 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ANDRE JONES, Appellant.

JUSTICE GOLDENHERSH delivered the opinion of the court:

Defendant, Andre Jones, was indicted with a codefendant, Freddie C. Tiller, Jr., in the circuit court of St. Clair County for three counts of murder (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)(1)), three counts of armed violence (Ill. Rev. Stat. 1979, ch. 38, par. 33A—2) and three counts of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18—2(a)). The St. Clair County public defender was appointed to represent him, but upon allowance of the public defender's motion to withdraw other counsel was appointed. Defendant entered a plea of not guilty which was subsequently withdrawn, and he pleaded guilty to the three murder charges. Pursuant to section 9—1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d)) the People requested a separate sentencing hearing and defendant elected to have a jury impaneled for those proceedings. The jury found, unanimously, that one or more of the factors set forth in the statute existed and, following the consideration of aggravating and mitigating factors, found unanimously that there were no mitigating factors sufficient to preclude a sentence of death. (See Ill. Rev. Stat. 1979, ch. 38, par. 9—1(g).) The jury returned a verdict directing the court to sentence defendant to death, and defendant was sentenced to death for each of the three murders. The sentences wre stayed (73 Ill. 2d R. 609(a)) pending direct appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 73 Ill. 2d R. 603).

The testimony and defendant's confession showed that on the morning of April 30, 1979, defendant left his apartment carrying a .22-caliber Rohm revolver. Defendant and his girlfriend walked until they met with Tiller. The three of them walked until they saw an elderly man, Richard Stoltz, standing in the back of a pickup truck, stacking bricks. Tiller, stating that he was going to rob Stoltz, asked defendant for his gun. Defendant gave his gun to Tiller, who told Stoltz, "This is a stickup." Stoltz raised his hands, and Tiller fired the gun, striking Stoltz in the left eye. Tiller then took a wallet, keys and a wrist watch from Stoltz' body. Defendant and Tiller rejoined the girlfriend, who had crossed the street. They continued their walk until they arrived at the Illinois Cleaners, located across the street from Jones' apartment. The girlfriend left after being told by defendant to go home. Defendant then suggested that he and Tiller rob the cleaners, and Tiller agreed. Defendant and Tiller entered the store and, once inside, defendant shot the proprietor, Samuel Nersesian, in the head. He fell to the floor, and defendant shot him again. Defendant then opened the cash register and took an undetermined amount of money. As they were about to leave, a mail carrier, Debra Brown, who had arrived in a mail truck, entered the store. Defendant hid behind the door, and when Miss Brown entered, defendant grabbed her around the neck from behind. He pushed her back through a kitchen located at the rear of the business and into a storage room. There defendant knocked her down, shot her in the chest, and then shot her in the mouth. Defendant and Tiller then left the store. Tiller left the scene in the mail truck, and defendant walked across the street to his apartment. All three of the shooting victims died.

Following the introduction of the foregoing evidence and the giving of instructions to the jury, the jury returned

a verdict finding that defendant had been convicted of murdering two or more individuals and that at the time of the offenses he had attained the age of 18 or more. (See Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3).) The cause then proceeded to the aggravation and mitigation phase.

The evidence showed that defendant had a significant history of criminal activity. Included therein was defendant's confession to two murders committed prior to the offenses for which he was being sentenced. No information in mitigation was offered by either defendant or the People. After deliberating for approximately 20 minutes, the jury returned a verdict unanimously finding that there were no sufficiently mitigating factors present to preclude imposition of the death sentence. Pursuant to the verdict and statute (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(g)), the court sentenced defendant to death for the murders of Richard Stoltz, Samuel Nersesian and Debra Brown.

We consider first defendant's contention that the death penalty provisions of the statute are unconstitutional for the reason that they do not contain sufficient guidelines to enable a jury to properly determine when the death penalty may be imposed. Defendant cites first the language of section 9—1(g) which in pertinent part provides:

> "If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(g).)

Citing definitions of "preclude" (Webster's Seventh New Collegiate Dictionary (1963); Random House Dictionary of the English Language (1973)) defendant argues that the statutory provision which requires the jury to impose death

if it "unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence *** must necessarily impose the capricious and arbitrary sentencing it seeks to avoid." He argues further that under a literal interpretation of the statute a jury "would be required to impose death unless defendant presented a complete defense to the aggravating factors qualifying him for the death penalty." The alternative to the literal interpretation, he contends, is that there are no standards or guidelines, and the weighing procedure mandated by our earlier cases is nullified.

We do not agree. In *People v. Brownell* (1980), 79 Ill. 2d 508, the defendant contended that the trier of fact was not given guidance as to the weight to be given the aggravating versus the mitigating factors and that section 9—1(g) was therefore unconstitutionally vague. In rejecting this contention the court said:

> "Without doubt, a balancing process is required; while the precise weight to be given each aggravating and mitigating factor is not made a matter of numerical calculation, that is not a constitutional infirmity. Rather, since the sentencing authority is given specific evidence to weigh, based upon the particularized circumstances of the case, any ' "discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." ' *Gregg v. Georgia* (1976), 428 U.S. 153, 198, 49 L. Ed. 2d 859, 888, 96 S. Ct. 2909, 2936, quoting *Coley v. State* (1974), 231 Ga. 829, 834, 204 S.E.2d 612, 615. As stated in *Proffitt*: 'While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* [*Furman v. Georgia* (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726] are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.' *Proffitt v. Florida* (1976), 428

U.S. 242, 258, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969." (79 Ill. 2d 508, 534.)

It is clear from the foregoing statement that preclusion of the death penalty does not require, as defendant contends, "a complete defense to the aggravating factors qualifying him for the death penalty." Furthermore, we find that section 9—1(g), as construed, fulfills the constitutional requirement that the sentencing authority be given specific factors to examine in determining whether to impose the death penalty.

We consider next defendant's contention that section 9—1(e) is invalid for failing to set any standard save relevance for the admission of information in the second phase of the sentencing hearing. Section 9—1(e) provides:

> "(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing." (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(e).)

It is argued that since the People are permitted to present any "information" relevant to other aggravating and mitigating factors regardless of its admissibility under the rules of evidence, the only restraint placed upon the State's Attorney's discretion is his personal sense of propriety. It is also argued that this provision penalizes a defendant for electing to be sentenced by a jury rather than a judge, who, when considering the information presented, would be possessed of knowledge of the rules of evidence. Finally, specific alleged examples are cited where it is claimed that defendant was prejudiced by reason of the jury's consideratioin of certain information.

The purpose of the aggravation and mitigation phase of the sentencing hearing is to insure that discretion in the area of sentencing be exercised in an informed manner. In *Woodson v. North Carolina* (1976), 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978, the Supreme Court said:

> "This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' *Pennsylvania ex rel. Sullivan v. Ashe* [(1937), 302 U.S. 51, 55, 82 L. Ed. 43, 46, 58 S. Ct. 59, 61]. Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams v. New York* [(1949), 337 U.S. 241, 247-49, 93 L. Ed. 1337, 1342-43, 69 S. Ct. 1079, 1083-84]; *Furman v. Georgia* [(1972), 408 U.S. 238, 402-03, 33 L. Ed. 2d 346, 443-44, 92 S. Ct. 2726, 2810-11] (Burger, C.J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles* [(1958), 356 U.S. 86, 100, 2 L. Ed. 2d 630, 642, 78 S. Ct. 590, 597] (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961, 96 S. Ct. 2978, 2991.

In *People v. La Pointe* (1981), 88 Ill. 2d 482, 496, we quoted with approval from *People v. Adkins* (1968), 41 Ill. 2d 297:

> " '[A] sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' (41 Ill. 2d 297, 300.) While 'the judge *** is not limited to considering only in-

> formation which would be admissible under the adversary circumstances of a trial,' he must 'exercise care to insure the accuracy of information considered.' 41 Ill. 2d 297, 300."

While in *La Pointe* and the authorities therein discussed the court was the "sentencing body," there is no valid reason to apply a different rule where the jury makes the determination. The court and the People are under a duty to avoid the introduction of evidence, the prejudicial effect of which outweighs its relevance. (See *People v. Riley* (1941), 376 Ill. 364, 369.) Section 9—1(e) also provides that both the People and the defendant "shall be given fair opportunity to rebut any information received at the hearing." The requirement that the information be relevant, construed in the light of these basic rules, imposes sufficient restraints on the exercise of the prosecutor's discretion and serves to minimize the risk of arbitrary and capricious action. Our holding that in imposing sentence a jury is entitled to the same latitude in considering information relevant to sentencing as is the court is in accord with those of most of the jurisdictions which have considered the question. See cases collected at Annot., 96 A.L.R.2d secs. 13 through 16, at 768, 811 (1964); 96 A.L.R.2d secs. 13 through 16, at 333, 339 (Later Case Serv. 1976); 96 A.L.R.2d Supp. secs. 13 through 16, at 153, 169 (Later Case Serv. 1981).

In considering many of defendant's contentions we note that it is well settled that a defendant in a capital case has no due process right to cross-examine all out-of-court sources of information relied upon in sentencing. (*Williams v. New York* (1949), 337 U.S. 241, 250-51, 93 L. Ed. 1337, 1343-44, 69 S. Ct. 1079, 1085.) Defendant contends that the revolver used in the April 30 shootings was improperly offered for the jury's consideration because its admission was based on hearsay testimony. During the aggravation and mitigation phase of the hearing an East St. Louis detective testified on direct examination that a certain .22-

caliber Rohm revolver was the weapon used in the April 30 shootings. The detective testified that he obtained this information from a sergeant on the East St. Louis police department who had received the information concerning the weapon from defendant and had then obtained the weapon from the home of the defendant's grandmother. The detective also testified that the weapon was tested for ballistics with slugs removed from the bodies of the victims. At this point defense counsel objected, and his objection was overruled. Defense counsel then asked that the record show continuing objection, and the court so ordered. The detective then testified that the ballistics tests from the crime laboratory were "positive," indicating that the revolver was the weapon used in the April 30 shootings. In view of the fact that defendant confessed to using a .22-caliber Rohm revolver in the shootings, we hold that the weapon was not improperly introduced into evidence.

Next, we consider whether information concerning defendant's past misconduct contained in a presentence investigation report was properly introduced at the sentencing hearing. A St. Clair County probation department investigator who had prepared a presentence report of defendant's character and background testified that according to records of the Juvenile Department of Corrections defendant had been involved in theft while incarcerated in a juvenile detention institution. The investigator further testified that according to information obtained from the parole board defendant had been involved in 22 disciplinary violations while incarcerated in the Menard Correctional Center. The investigator also quoted from a psychiatric report contained in an evaluation of defendant given to the parole board. The report stated that defendant "has aggressive tendencies, low frustration tolerance, high impulsivity, very poor delaying mechanism, and total inability to channel his aggression into constructive aspects of life."

In cross-examining the investigator defense counsel elicited other general information obtained from records concerning defendant. Apparently preparing the groundwork for his closing argument, defense counsel reviewed some of the information the parole board had before it when it released defendant. In closing argument defense counsel asked the jury to channel their desire to place blame on the parole board that released the defendant into a society where he did not belong. Had defense counsel's strategy succeeded it is doubtful that it would now be argued that it was unfair to permit proof by means of hearsay testimony of the information contained in the reports. In addition, we note that defense counsel asked the investigator whether it was not true that after talking with defendant and completing his investigations that it was found that much of the information provided by defendant was true, and the investigator agreed. Past criminal involvements disclosed by presentence investigation reports have been held a proper matter for consideration in sentencing (see *Williams v. New York* (1949), 337 U.S. 241, 250-51, 93 L. Ed. 1337, 1343-44, 69 S. Ct. 1079, 1085; see cases collected at Annot., 96 A.L.R.2d sec. 10(h), at 768, 804 (1964); 96 A.L.R.2d sec. 10(h), at 333, 339 (Later Case Serv. 1976); 96 A.L.R.2d sec. 10(h), at 153, 167 (Later Case Serv. 1981), and we hold that the inquiry here into defendant's background was within reasonable bounds.

We next consider whether the information contained in the defendant's confession to the other murders, committed prior to the April 30 murders, was improperly admitted at the aggravation and mitigation phase of the sentencing hearing. The record shows that on August 30, 1979, a detective from the St. Clair County sheriff's office interviewed Tiller at the St. Clair County jail to determine whether Tiller had any knowledge of other unsolved crimes in the St. Clair County area. Tiller told the detective that defendant might have been involved in some of those

crimes. The detective then interviewed defendant at the St. Clair County jail. After being advised of his constitutional rights, defendant expressed general knowledge of other homicides in the St. Clair County area without providing any specific information. Two days later, on September 1, 1979, defendant asked to see the detective. When the detective met defendant at the jail he was given a six-page statement, handwritten by defendant, confessing to the homicides of Michael and Dora Wallace. Having no knowledge of these homicides, the detective did not question defendant about his confession at that time. After having obtained information regarding the homicides the detective again met with defendant at the St. Clair County jail. As a result of this interview, information was gathered that corroborated the confession. In addition, defendant also arranged to have an unidentified female deliver to the detective the butcher knife used in the killings. The knife was subsequently identified as a butcher knife belonging to one of the victims.

The first question presented is whether this information was obtained in violation of the defendant's right to counsel. There is no question that under the sixth and fourteenth amendments a defendant is entitled to advice of counsel at the sentencing stage of the criminal process unless he has knowingly and intelligently waived this right. (*Mempa v. Rhay* (1967), 389 U.S. 128, 19 L. Ed. 2d 336, 88 S. Ct. 254; *Carter v. Illinois* (1946), 329 U.S. 173, 91 L. Ed. 172, 67 S. Ct. 216; *Johnson v. Zerbst* (1938), 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.) The record here reflects that the detective from the St. Clair County sheriff's office interviewed defendant at the St. Clair County jail where defendant was incarcerated after being charged with the April 30 murders. The purpose of this initial interview was to obtain any information defendant might have about other homicides in the East St. Louis area. Although counsel had been appointed for defendant, this initial inter-

view was conducted, and subsequently a confession was obtained, without the presence of or notice to defendant's attorney. The record shows, however, that at the time of the initial interview defendant was advised of his constitutional right to counsel and that he signed a waiver form. At this first interview he gave no specific information but told the detective that the reason he had been caught for the crimes he had committed in the past was that he had been identified by the victim or witness. He stated that the last time he was in the penitentiary he had made up his mind that he would never be identified by a witness or victim again because he would destroy them. It was defendant who initiated the subsequent contact with the detective, at which time defendant gave the officer his six-page handwritten confession of the Wallace killings. The record does not show how many more times the detective talked to defendant or whether defendant was again advised of his rights at the subsequent interviews. At those times he corroborated his confession by informing the detective that there had been a small brown dog at the Wallace home, where the killings occurred, by describing the knives and small caliber pistol that had been at the home, and by arranging to have the knife he said he used in the killings, later identified as the victim's knife, delivered to the county jail. Nevertheless, we find no violation of defendant's constitutional right to counsel. It is clear that defendant was no stranger to criminal proceedings and there is no claim that defendant was not aware of his right to confer with his attorney prior to giving any information to the detective. The voluntariness of defendant's participation in the interviews conducted at the St. Clair County jail is not contested. Defendant apparently voluntarily and knowingly waived his right to have counsel present at these interviews, and therefore the information obtained pursuant to these interviews cannot be suppressed on the ground that defendant's sixth amendment right to counsel was violated.

We next consider whether the offenses shown by defendant's confession were properly admitted into evidence. In *United States v. Dalhover* (7th Cir. 1938), 96 F.2d 355, the court considered whether it was permissible for a jury to consider a defendant's statement to a government agent, made while under arrest, in which the defendant's participation in approximately 150 robberies was admitted. In rejecting the contentions that it would be unfair to allow in this information of other offenses and that a jury lacked the discrimination capable of a judge in considering the information, the court said:

> "Of course it is illegal and manifestly unfair to require one charged with a specific crime to prepare a defense against other unrelated crimes that the state may attempt to prove against him, but which are not charged in the indictment. *** However, where, as here, the evidence of other crimes comes only from the lips of the accused in his admissions following his arrest, which he has never denied; and where he has pleaded guilty, so that there is no question as to finding him guilty of the crime charged by the proof of other unrelated crimes, there is no need for the application of the rule. Moreover, it seems to be generally the rule that the court in imposing sentence may take into consideration other offenses committed by the defendant, in the absence of a statute forbidding it. See annotation in 86 A.L.R. 832. There seems to be no good reason for denying the jury the same latitude." (*United States v. Dalhover* (7th Cir. 1938), 96 F.2d 355, 360.)

(See cases collected at Annot., 96 A.L.R.2d sec. 13, at 768, 811-12 (1964); 96 A.L.R.2d sec. 13, at 333, 339-40 (Later Case Serv. 1976); 96 A.L R.2d sec. 13, at 153, 169-70 (Later Case Serv. 1981).) In view of defendant's conviction on pleas of guilty, his voluntary confession, and the substantial corroboration present, we find no reason to conclude that the defendant's confession to the Wallace murders was improperly presented at the sentencing hearing.

We consider next the specific allegations of prosecutorial abuse as to the information presented. The record shows that Dora and Michael Wallace were found dead in their burning home in East St. Louis on November 15, 1978. It was established that Mrs. Wallace suffered deep lacerations to the throat area and bludgeoning of the face and head area, as well as deep gashes in the hands and arms. Mr. Wallace had been decapitated. Defendant's confession, which was read to the jury, contained the details of defendant's commission of the acts that resulted in the deaths of the Wallaces and the burning of their home. Defendant also confessed to taking Mr. Wallace's head with him and later discarding it in the area where the skull was subsequently found. A detective from the East St. Louis police department was asked on direct examination to relate to the jurors the circumstances as he confronted them when he arrived at the scene of the Wallace case on November 15, 1978. The following colloquy then took place:

"A. Well, the first thing I saw was a fireman running down the street, screaming. And it was about two or three firemen standing on the porch. And I approached the porch, and there was blood running down off the front porch, because it was raining, and I saw a body of a man who was—who had been beheaded, and was burning on one side. He had on some shorts, undershorts, and a white T-shirt that was soaked in blood.

Q. He was not fully dressed when you arrived there?

A. No.

Q. Did anyone indicate to you or did you learn whether or not that was the way he was when he was first seen by the fireman?

A. Well, the fireman explained to me they had entered the building or the smoke filled room, and had stumbled upon this body. And they had pulled it out onto the porch in an effort to give the person artificial respiration, and the fireman who was running down the street was the guy who was going to give artificial respiration, and there wasn't a head.

Q. So it was originally inside the house, the body?

A. Yes."

The description of the fireman's reaction was elicited in response to general questions posed by the State's Attorney on direct examination. The gruesome description contained in the detective's testimony was unnecessary to describing the circumstances of the scene, but we are not prepared to conclude that it was so totally unrelated to sentencing and prejudically inflammatory as to deny the defendant a fair hearing. While we acknowledge that the description of the fireman's reaction was bound to cause emotional response, we note that the jurors heard defendant's own grim and detailed description of the Wallace killings and the burning of their home. The jurors received this information after hearing defendant's confession to the murders of three people. In view of the aggravating factors present, and the complete absence of any mitigating circumstances, we cannot conclude that the jury was so inflamed by receiving the challenged information that it was unable to base its decision that there were no mitigating factors sufficient to preclude the death penalty on information properly presented.

At the first phase of the sentencing hearing the widow of Richard Stoltz was asked to identify a photograph of her husband, taken after he had been shot. At the conclusion of the second phase this photograph, along with several other photos depicting the victims of both the April 30 and the Wallace killings and the burned Wallace home, was presented to the jury as information relevant to an aggravating factor, specifically, to show the type of brutality in which defendant had engaged. It is unlikely that at this point in the proceedings the photographs would have created more revulsion in the jurors toward defendant than was already present. Since the jury deliberation took approximately 20 minutes it is clear that there was little difficulty in deciding that the death penalty was warranted, and we do not believe that the admission of these photographs at this late date in the proceedings deprived

defendant of the right to be sentenced by a rational tribunal.

We consider next whether the court's conduct during the sentencing proceedings violated defendant's fundamental right to a fair hearing as guaranteed by the due process clause of the fourteenth amendment. Foremost among the errors alleged is the claim that the court erred in allowing defendant's plea of guilty to be read to the jury. It is argued that the reading of the transcript denied defendant a fair trial because the court's comments contained therein implied the court's predisposition as to the sentence to be imposed, which in turn improperly influenced the jury in arriving at the verdict. The transcript of the plea proceeding was read to the jury during the first phase of the bifurcated hearing to establish defendant's age and the presence of a statutory factor in aggravation. Included in the reading were the court's admonishments to defendant that if statutory factors in aggravation were proved the court would not hesitate to sentence defendant to death.

At the time the People made a motion to introduce the transcript of the plea proceeding into evidence the court inquired of defense counsel, who expressly stated that there was no objection. It is urged that the failure to object to the reading at the sentencing hearing precludes our consideration of this claim.

In *People v. Carlson* (1980), 79 Ill. 2d 564, this court considered whether alleged errors not objected to by defendant at trial were waived. After examining the waiver doctrine, and our Rule 615(a) (73 Ill. 2d R. 615(a)), which embodies the exception to the waiver rule, the court adhered to the rule that even in the absence of objection at trial, a court of review will grant relief if the trial error is so prejudicial that real justice has been denied or the verdict of the jury resulted from such error. (See *People v. Carlson* (1980), 79 Ill. 2d 564, 576-77; *People v. Wright* (1974), 56 Ill. 2d 523, 533-34; *People v. Manzella* (1973), 56

Ill. 2d 187, 200.) The same rule applies whether the alleged errors occurred at trial or at sentencing. We will therefore examine the content of the transcript, as well as the other alleged sentencing errors, to determine whether any error deprived defendant of the fundamental right to a fair hearing.

In addressing defendant the court remarked, "if certain factors are present, you could be sentenced to death, ***. Did he [defendant's defense attorney] tell you that if the factors which are necessary and which are present and which I will read to you are present, I wouldn't hesitate to sentence you to death." He later went on to say, "I have to take into consideration our society, which has been neglected far too long by crimes of violence. And from what the facts appear to be here, these are senseless killings."

A judicial opinion should not influence the jury, either directly or indirectly. (*People v. Finn* (1959), 17 Ill. 2d 614, 617; *People v. Coli* (1954), 2 Ill. 2d 186, 189; *Marzen v. People* (1898), 173 Ill. 43, 57-59.) We note that at the conclusion of the first phase of sentencing the court instructed the jury: "Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be." Furthermore, when the court's remarks are read in the context of the entire plea proceeding, it becomes apparent that the court attempted to firmly impress upon defendant the grim fact that if he pleaded guilty to three murders, and if he chose to be sentenced by the court, and if the People proved beyond a reasonable doubt any statutory factor in aggravation, the court would not hesitate to sentence defendant to death. The court was required to inform defendant of such matters at the time of accepting his plea, and to determine that defendant understood this information. (73 Ill. 2d R. 402.) The veniremen were addressed, without challenge, along the same lines, in that each was questioned as to any hesitancy to abide by the

death penalty statute, even if it meant the imposition of the death penalty if the aggravating factors were proved. We are not persuaded that defendant was prejudiced as the result of the transcript having been read to the jury at the sentencing hearing.

It is alleged that certain comments made by the court to the veniremen during *voir dire* examination were misstatements of law and that the court's conduct expressed a sarcastic attitude toward defendant. The record shows that, prior to questioning each panel of veniremen, the court attempted to familiarize the panel with the purpose and order of the bifurcated sentencing procedure. It is argued that the court's introductory remarks concerning the aggravation and mitigation phase of the hearing are considered objectionable for the same reason that section 9—1(g) is challenged on appeal; that the court implied that defendant must disprove the aggravating factors to escape the death penalty. We have examined the challenged passages and conclude that the court sufficiently informed the veniremen of the procedure under section 9—1(g). We find no merit in the contention that the court misstated the law in this regard.

It is further urged that another of the court's comments during *voir dire* compounded the prejudicial effect of an inappropriate jury instruction given at the conclusion of the hearing. A standard and unobjected-to general instruction included the sentence, "Your agreement upon a verdict must be unanimous." At one point during *voir dire*, the court advised a prospective juror, "you go out and determine whether or not this evidence has taken away the factors, mitigated the factors so that you might say no, we don't want to vote for the death penalty. Now, that has to be a unanimous verdict in this case." It is urged that the instruction and comment created a presumption in favor of the imposition of the death sentence. The record shows, however, that the jury was instructed

that it would receive, and that the jury did receive, two forms of verdict. One form stated that the jury was unable to unanimously conclude that the death penalty was warranted, and another stated that the jury unanimously concluded that there were no sufficiently mitigating factors to preclude the imposition of the death sentence. The jury was instructed that it was entitled to determine which verdict form was warranted. In view of the comments made by counsel during the proceedings, the proper instructions given by the court, and the verdict forms, it is clear that any confusion caused by the inappropriate instruction and the ambiguous, isolated comment by the court was inconsequential. There is no question whether the jurors were made aware of the right to arrive at a verdict of their choice, and the record presents no reason to conclude that defendant was prejudiced by court pronouncements of law.

It is also claimed that during *voir dire* the court improperly expressed personal knowledge of an essential element not yet proved and improperly implied that the determination of this critical question was nothing more than a formality. A prospective juror asked the court "why don't you know if he [the defendant] is 18?" The court responded that "I do know whether he is 18 or not, but the legislature said we have to do it all over again. *** This is something that was given to us by the legislature, and I have to proceed according to law. So that—well, that is what the defendant wants, and that is what he gets." Although no objection was made at the time the court's comment was made, the venireman was later challenged for cause by defense counsel. The record shows that the age element was satisfied through defendant's own admission of his age. The court's comment could not possibly have affected the finding of age, and we are not persuaded that this statement communicated a negative attitude toward defendant. In another comment made by the court at the conclusion of the first stage of the bifurcated hearing the court di-

rected court personnel to "Get instructions for this stage of the game." This comment, like the reference to the legislative decision above, may be criticized as showing discontent with legislative imposition of time-consuming procedures, but it does not indicate an opinion as to what penalty should be imposed against defendant.

Finally, we consider whether, as contended by defendant, the closing argument of the State's Attorney denied defendant his right to a fair sentencing hearing. Although there was no contention that defendant was in any way involved in the crime of rape, the State's Attorney in closing argument made several references to the threat posed by the crime of rape. First, in arguing the harm caused by defendant's acts of violence the State's Attorney alluded to the amount of liberty lost by society in general as a consequence of criminal activity and then mentioned the inability of a man to go to work in the morning in East St. Louis without being gunned down, and the inability of a woman to deliver mail in broad daylight in East St. Louis without being afraid that she is going to be raped and shot, obviously alluding to the victims of the April 30 shootings. At this point the court sustained an objection made by defense counsel and instructed the jury to disregard any reference to rape. Next, in arguing the need for severe penalties for those who commit violent crimes, the State's Attorney twice mentioned the crime of rape. The initial reference to rape was clearly objectionable, but the court's ruling on the objection and the court's instruction to disregard any reference to rape substantially corrected this error. (See *People v. Lion* (1957), 10 Ill. 2d 208, 216.) The later two references to rape were not directed at defendant, and no objection was made to these references during argument. In view of the earlier instruction to disregard all references to rape we are of the opinion that the jury was not misled thereby. We are not persuaded that defendant, by these

comments, was deprived of a fair hearing. See *People v. Smothers* (1973), 55 Ill. 2d 172, 176.

At another point in closing argument the State's Attorney, apparently in an attempt to discredit defense counsel's argument in favor of a natural life sentence, presented the following rhetorical question to the jury, "How about the guards in that institution, and the inmates in that institution, are you so sure that you can preserve him from committing crime again by doing anything other than what he deserves, the death penalty?" We cannot say that this question regarding the safety of the hypothetical guard and inmates, not objected to at sentencing, was improper under these circumstances. After examining the State's Attorney's closing argument we find no reason to conclude that any comment made was so inflammatory as to deny defendant his right to a fair hearing.

We find no reversible error, and the sentences imposed for the murders of Samuel Nersesian and Debra Brown are affirmed. The sentence imposed for the murder of Richard Stoltz must, however, be vacated and the cause remanded to the circuit court of St. Clair County for the imposition of a sentence other than death. In *Enmund v. Florida* (1982), ____ U.S. ____, 73 L. Ed. 2d 1140, 102 S. Ct. 3368, the Supreme Court held that the defendant could not be put to death for two killings that he did not commit and had no intention of committing or causing. With respect to the death of Richard Stoltz there is nothing in the record that shows that defendant killed, attempted to kill, or intended to kill the victim, and the decision in *Enmund* requires that the death sentence be vacated. The cause as to the Stoltz murder is therefore severed and remanded to the circuit court of St. Clair County for the imposition of a sentence other than death.

As to the judgment pertaining to the other two murders, the clerk of this court is directed to enter an order fixing Wednesday, May 18, 1983, as the date on which the

sentence of death entered in the circuit court shall be executed at the Illinois State Penitentiary at Joliet. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and the wardens of the Illinois State Penitentiary at Menard and Joliet.

Affirmed in part and vacated in part and remanded in part, with directions.

JUSTICE SIMON, dissenting:

I do not agree that the defendant was given a fair sentencing hearing by a jury free from undue influence by the trial judge. A transcript of the proceedings in which Jones entered his guilty plea was read to the sentencing jury as a part of the evidence. The jury heard that the trial judge told Jones when the guilty plea was received "if certain factors are present, you could be sentenced to death ***. Did he [defendant's attorney] tell you that if the factors which are necessary and which are present and which I will read to you are present, I wouldn't hesitate to sentence you to death." Also read to the jury was the trial judge's later statement, "I have to take into consideration our society, which has been neglected for too long by crimes of violence. And from what the facts appear to be here, these are senseless killings."

What the trial judge meant by these statements is not clear. When he spoke of the factors "which are present" was it simply a slip of the tongue? Did he mean to say that if certain necessary factors which he would read to the defendant were present, he would sentence the defendant to death, or was he actually expressing his opinion that the factors were present? When he said he would not hesitate to sentence the defendant to death did he intend to indicate that he believed such a sentence was appropriate in

this case or was he merely expressing his willingness to follow the law which he believed gave him no discretion? When he said the killings were senseless did he mean they were more deserving of the death penalty than other triple murders, or that all murders were senseless in his eyes?

The risk that the jurors interpreted the trial judge's words to mean that he thought the death sentence was appropriate for Jones is too great. I believe that, in spite of the cautionary instruction given by the judge at the close of trial telling the jurors that nothing he said should be construed as expressing his opinion, some of the jurors may well have interpreted his comments as partisan.

The majority agrees that an expression of opinion by a judge must not be allowed to influence a jury. (See *People v. Finn* (1959), 17 Ill. 2d 614, 617; *People v. Coli* (1954), 2 Ill. 2d 186, 189; *Marzen v. People* (1898), 173 Ill. 43, 57-59.) A judge at a jury trial is not merely a moderator. The jury looks to him for guidance and wisdom. They depend upon his knowledge of the law and experience. As such, they are apt to be impressed by his every word. (*Bollenbach v. United States* (1946), 326 U.S. 607, 90 L. Ed. 350, 66 S. Ct. 402.) In this case the manner in which the jurors might have construed the trial judge's remarks cast him in the role of an additional prosecutor. (See *Wong Yang Sung v. McGrath* (1950), 339 U. S. 33, 94 L. Ed. 616, 70 S. Ct. 445, *modified on other grounds* (1950), 339 U.S. 908, 94 L. Ed. 1336, 70 S. Ct. 564; *Ruiz v. Dalgado* (1st Cir. 1966), 359 F.2d 718.) I believe it was a serious error to allow the jury to hear the judge's remarks quoted above.

I also believe, even from the cold record, that the jury could have gained the impression that the trial judge was impatient with the defendant and therefore become prejudiced against the defendants themselves for delaying the disposition of the case. I refer here to the trial judge's remarks, set forth in the majority opinion, when a juror asked the judge why he did not know if the defendant was

18 and also the court's direction to "get instructions for this stage of the game." Both of these comments are set forth in the court's opinion. Both remarks could have left the jury with the impression that the defendant was taking positions that ccaused the State to introduce matters over which there should have been no controversy and thus might have resulted in the jury being biased against the defendant.

I am also concerned about this court's failure to deal adequately with the defendant's argument that some members of the jury might have understood the judge to say that the burden of proof is on the defendant to prove that mitigating factors exist. The judge advised prospective jurors, "you go out and determine whether or not this evidence has taken away the factors, mitigated the factors so that you might say no, we don't want to vote for the death penalty." The defendant contends the jurors may have interpreted this to mean that the burden was on him. The majority points out that at other stages in the proceeding, it was made clear that a unanimous verdict must be reached before a death penalty can be imposed, and thus no harm occurred. The issue here, however, is not how many persons must agree, but what they agree to. Must the jury unanimously agree that beyond a reasonable doubt no sufficient mitigating factor exists, or that more likely than not no sufficient mitigating factor exists or that the defendant has failed to show that such mitigating factors exist? The jury does not know and neither do I. Unanimity, however, has nothing to do with the question.

For the above reasons I would vacate the defendant's sentence of death and remand for a new sentencing hearing.

APPENDIX D

Docket No. 53415—Agenda 1—May 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. LUIS RUIZ, Appellant.

CHIEF JUSTICE RYAN delivered the opinion of the court:

By information filed in the circuit court of Cook County, Luis Ruiz and Juan Caballero were charged with the murders of Michael Salcido, Arthur Salcido, and Frank Mussa. The defendants were also charged with armed violence (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 33A—2) and unlawful restraint (Ill. Rev. Stat. 1979, ch. 38, par. 10—3(a)) as to each of the victims. Ruiz and Caballero were granted a severance and were subsequently tried simultaneously before a single judge, making use of two separate juries. At the conclusion of trial, the Ruiz jury returned a verdict of guilty on all counts. The prosecutor requested a hearing to consider whether the death penalty should be imposed. The defendant waived a jury and, after hearing evidence in aggravation and mitigation, the trial judge sentenced Luis Ruiz to death. (Ill. Rev. Stat., 1978 Supp., ch. 38, pars. 9—1(d), (h).) The sentence was stayed (73 Ill. 2d R. 609(a)), pending direct appeal to this court pursuant to Rule 603 (73 Ill. 2d R. 603). Caballero was also convicted of three counts of murder, three counts of armed violence and three counts of unlawful restraint. After a separate sentencing hearing he was also sentenced to death. We consider in this appeal only the conviction and sentence of Luis Ruiz.

For the reasons expressed in this opinion, we affirm the conviction and sentence of death.

On the evening of February 24, 1979, Arthur Salcido, then 19 years of age, and Frank Mussa, 16 years of age,

both of Princeton, Illinois, together with Arthur's brother, Michael Salcido, 17 years of age, drove from Princeton to Chicago. Michael had been visiting his brother in Princeton, and that night the three boys went to his mother's apartment in Chicago. The boys had borrowed a car in Princeton and arrived in the city about midnight. At approximately 1 a.m., the three youths left the apartment and drove to an all-night restaurant in the neighborhood.

Defendant Luis Ruiz, aged 19, Juan Caballero, Placedo Laboy, and a fourth youth named Aviles, encountered Arthur, Michael and Frank in the restaurant. Michael approached Ruiz and inquired whether he knew where some marijuana could be obtained. Ruiz responded that he did not have any marijuana and he did not know where any could be obtained. Michael then asked Ruiz if he knew a person named Jose Cortez, a Latin Eagle. Ruiz, who was himself a member of a rival gang, the Latin Kings, asked Michael if he was a Latin Eagle. Michael responded affirmatively. Ruiz then told Michael that he and his companions were also Latin Eagles. At this point, Michael began to brag to Ruiz that he had ridden on "hits" with the Eagles and had been the driver on one such "hit" by the Eagles on two Latin Queens, the female companions and counterparts of the Latin Kings. After this exchange, Ruiz told Michael that he did in fact know where to obtain marijuana and that he would show Michael where to get it.

All got into the victims' automobile with Michael, Arthur and Frank in the front. Ruiz and his companions were in the back seat. Ruiz directed the driver into an alley where Ruiz and his companions got out of the car. They told Michael to accompany them down the alley and they would show him the location of the marijuana. Once they were out of sight of the automobile, Ruiz and his friends revealed that they were not Eagles but were instead Latin Kings, after which they beat Michael Salcido to the ground. When the beating was over, Laboy produced a gun

and Aviles a knife, and they all marched Michael back to the car.

All seven youths then got into the car at the direction of Ruiz and his group. Laboy took over as driver, with Ruiz occupying the back seat along with Michael. Laboy drove to a second alley which was T-shaped. He drove some distance down the "T" where he stopped the car. Laboy and Caballero then took Michael and Frank around the corner of the alley and forced them to lie face down in the snow. Ruiz remained with the car while Aviles stabbed and killed Arthur Salcido in the automobile. Laboy then brought Frank Mussa back to the car, took the same knife, and stabbed Frank Mussa to death. Finally, Caballero returned with Michael Salcido and stabbed him to death in the back seat of the car. The members of the group then took articles of clothing from the trunk of the victims' automobile and attempted to wipe the vehicle clean of fingerprints. After completing this task, Ruiz and the others all left the scene. Ruiz and Caballero were arrested on March 3, 1979, and charged with the offenses described above.

In this appeal, defendant argues that because there is no evidence that he actually did any of the acts which resulted in death, his conviction on the principle of accountability cannot form the basis for imposition of the death penalty under the Illinois statute (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1). Further, if the statute allows death to be imposed on a defendant who is merely accountable for the conduct of another, such provision is unconstitutional. In addition, the defendant argues that the procedure employed at trial denied his right to a severance and that he has not been proved guilty beyond a reasonable doubt.

We turn first to a consideration of whether the proof adduced at trial is sufficient to sustain a conviction for murder, armed violence, and unlawful restraint. We agree with the defendant that there is no direct evidence estab-

lishing that Ruiz ever struck any of the blows that resulted in the deaths of the victims. However, the case was submitted to the jury with proper instructions setting forth the principle of accountability, and the record proves Ruiz' guilt on each charge beyond a reasonable doubt as a willing participant in the criminal enterprise. There is no doubt that Ruiz was legally accountable for the conduct of his companions and, as such, shares equally in their guilt.

In *People v. Rybka* (1959), 16 Ill. 2d 394, this court upheld the defendants' murder convictions predicated solely upon their being accountable for the actors' conduct, even though they were not present during the crime. In *Rybka*, 13 persons embarked upon a venture to "get a negro." (16 Ill. 2d 394, 400.) They departed in two groups, employing separate vehicles, an Oldsmobile and a Chrysler. The two groups started out together, being led by the Oldsmobile, but soon became separated. The occupants of the Chrysler eventually disbanded and went home without incident. The other group, however, accomplished their purpose when one of them struck the victim in the head with a hammer. Despite the fact that defendants Gorski and Budz were occupants of the Chrysler and consequently not present when the crime was committed, this court upheld their convictions for murder and observed:

> "Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction as a principal for a crime committed by another in furtherance of the venture. *People v. Tarver*, 381 Ill. 411; *People v. Rudecki*, 309 Ill. 125." (*People v. Rybka* (1959), 16 Ill. 2d 394, 405.)

Active participation has never been a requirement for the imposition of criminal guilt upon the theory of accountability. *People v. Morgan* (1977), 67 Ill. 2d 1, 9; *People v. Kessler* (1974), 57 Ill. 2d 493, 497-98, *cert. denied* (1974), 419 U.S. 1054, 42 L. Ed. 2d 650, 95 S. Ct. 635; *People v.*

Allen (1974), 56 Ill. 2d 536, 541, *cert. denied* (1974), 419 U.S. 865, 42 L. Ed. 2d 102, 95 S. Ct. 120; *People v. Hill* (1968), 39 Ill. 2d 125, 134-35, *cert. denied* (1968), 392 U.S. 936, 20 L. Ed. 2d 1394, 88 S. Ct. 2305; *People v. Johnson* (1966), 35 Ill. 2d 624, 626; *People v. Richardson* (1965), 32 Ill. 2d 472, 476-77, *cert. denied* (1966), 384 U.S. 1021, 16 L. Ed. 2d 1023, 86 S. Ct. 1935.

Section 5—2(c) of the Criminal Code of 1961 provides that a person is legally accountable for conduct of another when:

> "Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. ***" Ill. Rev. Stat. 1977, ch. 38, par. 5—2(c).

In this case, the testimony of Julio Lopez and the assistant State's Attorney, to whom Ruiz made incriminating statements, establishes that Ruiz was a principal character in the common enterprise obviously bent on committing acts of violence upon the victims. Ruiz admitted to the State's Attorney that he initiated the plan to mislead the victims into believing that Ruiz and his group were Latin Eagles. This admission was corroborated by Julio Lopez, who testified that on March 2, 1979, Ruiz, in the presence of Placedo Laboy and himself, stated, "Do you know who 'offed' those three guys in that car? It was us." Ruiz then went on to relate the details of the event, including the fact that they had misled their victims into believing they were Latin Eagles instead of Latin Kings. The only conceivable purpose of the deception was to allow Ruiz and his friends to maneuver the victims into a situation where they could avenge the "hit" upon the Latin Queens, of which Michael had bragged earlier. Having aided Caballero and the others in their plot to do violence to these victims by deceiving them and getting them into the car, Ruiz became accountable for the conduct of each member of the group.

In fact, the evidence discloses that it was Ruiz who told the victims he could procure marijuana for them and who directed them to drive into the alley where Ruiz and his companions administered a severe beating to Michael. After the beating, Ruiz again entered the car, which then proceeded to the location where the victims were brutally murdered. The defendant argues that his mere presence at the scene of the crime does not make him accountable for the murders. The evidence shows much more than the defendant's mere presence. His continued presence during the commission of all three murders, plus his participation in the attempt to obliterate fingerprints after the crimes were committed, are alone sufficient to show " 'a common design to do an unlawful act to which all assent.' " (*People v. Morgan* (1977), 67 Ill. 2d 1, 10, *cert. denied* (1977), 434 U.S. 927, 54 L. Ed. 2d 287, 98 S. Ct. 411; *People v. Washington* (1962), 26 Ill. 2d 207, 209.) Later in this opinion we shall discuss additional evidence concerning the extent of Ruiz' involvement.

We also reject the defendant's assertion that because he did not take the knife and did nothing to facilitate the actual killings he had somehow withdrawn from the enterprise and ceased to be accountable for the conduct of the others. Once a person becomes accountable for the conduct of another, he remains so until he detaches himself from the criminal enterprise. This court has held that no withdrawal is possible until the person desiring to withdraw effectively communicates his intention to the others so as to give them an opportunity to follow his example and to do so before the act with which he is charged has commenced, or has become so inevitable that it could not reasonably be stayed. (*People v. Brown* (1962), 26 Ill. 2d 308; *People v. Rybka* (1959), 16 Ill. 2d 394, 406.) The defendant in this case has failed to produce any evidence of his withdrawal. In point of fact, all inferences to be drawn from the record are to the contrary. If Ruiz desired to withdraw from the

murders of these three boys, he had ample opportunity even after Michael had been beaten. The fact that Ruiz got into the car and rode to the second alley, and remained during the commission of all three murders, destroys any notion that he was no longer participating in the criminal enterprise. Further, as noted earlier, after the crime had been completed, all of the perpetrators, including Ruiz, remained at the scene to wipe fingerprints off of the vehicle. Evidence of events occurring after the crime had been committed is competent to show participation in the crime itself. *People v. Kolep* (1963), 29 Ill. 2d 116, 120.

We turn next to the matter of how this trial was conducted and the issue raised concerning severance. The defendant's contention is basically that although his motion for a severance was granted, the trial court negated its effect by conducting a simultaneous trial before two juries and ruling that if either defendant took the stand to testify, both juries would be present. The defendant argues that this action deprived him of his right to a severance and amounted to a denial of a fair trial.

An accused does not have a right to be tried separately from his companions when charged with offenses arising out of a common occurrence. (*People v. Yonder* (1969), 44 Ill. 2d 376, 386, *cert. denied* (1970), 397 U.S. 975, 25 L. Ed. 2d 270, 90 S. Ct. 1094; *People v. Watt* (1942), 380 Ill. 610, 613.) The question of whether a severance should be granted in a particular case is a matter largely within the discretion of the trial judge. (*People v. Henderson* (1967), 37 Ill. 2d 489, 492, *cert. denied* (1967), 389 U.S. 943, 19 L. Ed. 2d 297, 88 S. Ct. 305.) The primary question to be considered is whether the defenses of the several defendants are so antagonistic that any or all of them could not receive a fair trial unless a severance is granted. (*People v. Brooks* (1972), 51 Ill. 2d 156, 166; *People v. Bernette* (1970), 45 Ill. 2d 227, 241, *rev'd on other grounds* (1971), 403 U.S. 947, 29 L. Ed. 2d 858, 91 S. Ct. 2290-91; *People*

v. Gendron (1968), 41 Ill. 2d 351, 357, *cert. denied* (1969), 396 U.S. 889, 24 L. Ed. 2d 164, 90 S. Ct. 179.) Here, neither Ruiz nor Caballero gave notice that he intended to proceed by way of any defense which would be inconsistent with their presence at the crime scene or their mental capacity to commit these offenses. It would be pure speculation to conclude that either of these defendants was forced not to testify, or was otherwise prejudiced by the fear that accusatory testimony might be delivered by the other in retaliation. Mere apprehension of a particular result will not sustain an allegation of prejudice to the accused. *People v. Yonder* (1969), 44 Ill. 2d 376, 386, *cert. denied* (1970), 397 U.S. 975, 25 L. Ed. 2d 270, 90 S. Ct. 1094; *People v. Gendron* (1968), 41 Ill. 2d 351, 357, *cert. denied* (1969), 396 U.S. 889, 24 L. Ed. 2d 164, 90 S. Ct. 179.

Moreover, the motion for severance was granted in this case primarily to avoid possible conflict with *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. Caballero had apparently made certain incriminating statements which implicated Ruiz. To avoid the possibility that these statements would be admitted into evidence as a confession, regardless of whether Caballero took the stand, and thereby violate the *Bruton* rule as to Ruiz, the trial court employed two juries. Under the procedure used, including the ruling that both juries would hear the testimony of either defendant, any possible conflict with *Bruton* was avoided. The reason is that if Caballero took the stand and, consistent with his prior statement, implicated Ruiz, he would be in effect a State's witness against him, subject to cross-examination the same as any other witness. In this situation the *Bruton* problem is avoided because the out-of-court statement would not be put into evidence. On the other hand, if Caballero did not take the stand and the State attempted to introduce the statement as proof of Caballero's guilt, any potential conflict with *Bruton* could be avoided by removing the Ruiz

jury. In addition, even if the trial judge had ruled that both juries would be present during cross-examination, *Nelson v. O'Neil* (1971), 402 U.S. 622, 29 L. Ed. 2d 222, 91 S. Ct. 1723, would compel us to hold that such ruling would be correct. In *Nelson*, the Supreme Court held that in a joint trial before a single jury a defendant's sixth amendment rights were not violated when his codefendant took the stand and was subsequently impeached with a prior statement implicating the defendant.

We hold therefore that since both juries would have been entitled to hear the testimony of these defendants, the trial court's granting of the motion upon these conditions was not an abuse of discretion, nor did it prejudice defendant Ruiz so as to deny him a fair trial. There remains, however, the question of whether the procedure of employing two juries in this fashion amounts to a *per se* denial of some constitutional protection.

This identical issue has been presented and resolved in favor of the multiple-jury procedure as a device to avoid the *Bruton* confrontation problem. In *United States v. Sidman* (9th Cir. 1972), 470 F.2d 1158, *cert. denied* (1973), 409 U.S. 1127, 35 L. Ed. 2d 260, 93 S. Ct. 948, the court, recognizing the potential for error of constitutional proportions, nonetheless found that multiple juries did not deny an accused any of his rights provided by the Constitution or the Federal Rules of Criminal Procedure. The same conclusion has been reached in other cases. (See *United States v. Rowan* (6th Cir. 1975), 518 F.2d 685, *cert. denied* (1975), 423 U.S. 949, 46 L. Ed. 2d 284, 96 S. Ct. 368; *United States v. Rimar* (6th Cir. 1977), 558 F.2d 1271, *cert. denied* (1978), 435 U.S. 922, 55 L. Ed. 2d 515, 98 S. Ct. 1484.) While we, too, recognize the possibility for prejudicial error resulting from confusion at trial inherent in this procedure, we conclude that in this case no such error exists.

From the onset the trial judge exercised extreme caution in instructing each member of the two juries as to

what exactly was going on. The record is replete with reminders and admonishments to the effect that neither jury is to discuss any aspect of the case with the other. Each side was well aware of the presence of the other jury, and counsel, along with the court, took great care in insuring that each jury heard only that evidence which was relevant to each respective case. Due to the nature of the testimony, most of the evidence offered at trial was admissible against both defendants. The record fails to disclose a single incident of confusion or impropriety. The Supreme Court has observed that a defendant in a criminal case is entitled to a fair trial, not a perfect one. (*Lutwak v. United States* (1952), 344 U.S. 604, 619, 97 L. Ed. 593, 605, 73 S. Ct. 481, 490.) Based upon the record now before us, we believe that mandate has been fulfilled in this case.

The defendant next argues that the Illinois statute providing for imposition of the death sentence was not intended to be applied to those persons found guilty of murder under the theory of accountability. We do not agree. The statute does not specifically preclude the imposition of the death penalty if the defendant's conviction is based on accountability. Section 9—1(c)(5), however, lists, as a mitigating factor, "the defendant was not personally present during the commission of the act or acts causing death." (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1(c)(5).) Thus, if a defendant were convicted of murder under the accountability theory, and was not personally present when the acts causing death were committed, as was the case with some of the defendants in *People v. Rybka* (1959), 16 Ill. 2d 394, mentioned above, this fact may be considered in mitigation. By contrast, there is no provision in the statute for special consideration of a defendant convicted on the theory of accountability when he is personally present when the acts causing death are committed. It would appear that the typical case in which a defendant would not be present during the act or acts causing death would be a

case in which the defendant would be found guilty of murder on the basis of accountability. If the legislature had intended that under the accountability theory, and was not personally present when the acts causing death were committed, as was the case with some of the defendants in *People v. Rybka* (1959), 16 Ill. 2d 394, mentioned above, this fact may be considered in mitigation. By contrast, there is no provision in the statute for special consideration of a defendant convicted on the theory of accountability when he is personally present when the acts causing death are committed. It would appear that the typical case in which a defendant would not be present during the act or acts causing death would be a case in which the defendant would be found guilty of murder on the basis of accountability. If the legislature had intended that the death penalty would not be applicable where the defendant is found guilty of murder on the basis of accountability, there would have been no reason to provide for his absence as a mitigating factor.

The defendant notes that the legislature, in cases of felony murder, precludes the imposition of the death penalty if the defendant did not actually kill the individual. (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1(b)(6)(a).) The defendant argues that this establishes the legislature's intent that any defendant who does not strike the fatal blow should not be sentenced to death. This conclusion does not follow. Since the only intent necessary to support a felony-murder conviction is that to commit the underlying felony (*People v. Hickman* (1974), 59 Ill. 2d 89, *cert. denied* (1975), 421 U.S. 913, 43 L. Ed. 2d 779, 95 S. Ct. 1571; *People v. Auilar* (1974), 59 Ill. 2d 95, 101; *People v. Miller* (1980), 89 Ill. App. 3d 973, 979; *People v. Nelson* (1979), 73 Ill. App. 3d 593, 595; Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)(3)), the legislature provided that the death penalty can only be imposed upon the one actually doing the killing, to avoid the possibility of a person being put to death without

having possessed even the general intent for the crime of murder. Also, as noted above, it provided that a mitigating factor in other murders, obviously based on accountability, is the lack of personal presence. If the legislature intended that the death penalty not be imposed on those who were personally present but did not actually kill in every case, it could have so provided. The trial court properly noted that accountability is not incompatible with the death penalty in cases other then felony murders.

In addition to the evidence as to Ruiz' involvement previously noted, some other evidence not previously recited is extemely significant. Julio Lopez, a former member of the Latin Kings gang, testified that Ruiz, in telling him of the murders, said that he, Ruiz, held a gun on the victims while the others did the stabbing and that he checked the bodies afterwards to see if the victims were dead. The defendant contends that since Lopez did not include these comments in his prior statement to the assistant State's Attorney, they are not worthy of belief. The degree to which Lopez' testimony may have been discredited must be determined by the trier of fact at the trial, or by the trial judge at the sentencing hearing, if the hearing is before the judge and not a jury. We cannot say, as a matter of law, that Lopez' testimony had no probative value. On the contrary, it strongly supports the verdicts of guilty and the judge's decision as to the penalty. Although the statements concerning the gun and checking of the bodies do not show that Ruiz struck the actual blow that killed the victims, they do show a substantial involvement by Ruiz in the actual killings.

Also, the assistant State's Attorney who questioned Ruiz testified that, in relating his story, Ruiz told him that after they had beaten Michael and before arriving at the alley where the victims were murdered, Placedo Laboy stated that they would have to kill these people because they had seen their faces. The assistant State's Attorney

also testified that Ruiz told him that when the boys were being stabbed, he stayed outside the car and that, after Frank had been stabbed, Laboy handed him the knife, but he refused to take it. Michael was then brought to the car, pushed into the back seat, and stabbed by Juan Caballero. Although Ruiz consented to be interviewed by the assistant State's Attorney, he refused to give a statement in the presence of a court reporter. The assistant State's Attorney's testimony was based on a memorandum he had prepared following his interview with Ruiz and also based on his memory. In any event, all of the evidence, both favorable and unfavorable to the accused, was properly presented to the jury at trial, and the judge during sentencing, for their consideration as to its persuasiveness. The defendant has failed to establish that any of the incriminating evidence was not worthy of belief as a matter of law.

The defendant relies heavily on Justice White's concurring opinion in *Lockett v. Ohio* (1978), 438 U.S. 586, 621-28, 57 L. Ed. 2d 973, 1000-04, 98 S. Ct. 2954, 2981-85 in support of his contention that the death penalty cannot be constitutionally imposed upon a defendant guilty of murder on the basis of accountability. We find this reliance to be misplaced. Justice White's opinion does not state that a person who does not do the actual killing may not constitutionally be sentenced to death. The opinion, instead, is concerned with the question of intent. In that case the defendant was participating in a planned robbery and was seated in a car while her companions, in the course of the robbery, killed a person. Justice White expressed the concern that although proved guilty beyond a reasonable doubt, it was not established that Lockett possessed any intent to kill independent of the person who actually performed the acts resulting in death. As noted earlier, under our statute, the death penalty will not be imposed where a defendant is convicted of felony murder unless he performed the acts which resulted in death. This limitation insures that an in-

ference of at least the general intent sufficient to support a murder conviction will be present before someone is put to death for felony murder. Where guilt is premised on the accountability theory the intent of the actor is imputed to the defendant but his absence from the crime scene will be a mitigating factor that would prevent imposition of the ultimate penalty in cases like *Rybka*. Moreover, the concurring opinion of Justice White recognizes that the facts of a particular case might well permit an inference that the defendant had the requisite intent independent of any imputed to him by way of accountability. This conforms to the settled law of this State holding that the intent to take a life may be inferred from defendant's acts and the circumstances surrounding the commission of the offense. *People v. Jones* (1979), 81 Ill. 2d 1, 9-10; *People v. Muir* (1977), 67 Ill. 2d 86, *cert. denied* (1977), 434 U.S. 986, 54 L. Ed. 2d 481, 98 S. Ct. 615 (partially overruled in *People v. Harris* (1978), 72 Ill. 2d 16, 27); *People v. Koshiol* (1970), 45 Ill. 2d 573, *cert. denied* (1971), 401 U.S. 978, 28 L. Ed. 2d 329, 91 S. Ct. 1209; *People v. Coolidge* (1963), 26 Ill. 2d 533.

In this case Ruiz' intent to participate in the premeditated acts resulting in the death of the three victims is established beyond a reasonable doubt, whether considered under the accountability statute (Ill. Rev. Stat. 1977, ch. 38, par. 5—1 *et seq.*), or whether his intent is judged solely from his own acts and conduct. In support of this conclusion it is again appropriate to reiterate Ruiz' participation in this series of tragic events.

It was Ruiz who first deceived the three victims by telling them that he was a Latin Eagle when they bragged to him that they had participated in a "hit" on some Latin Queens. It was Ruiz who directed that they all get into the victims' car and drive to the first alley. Ruiz took Michael down the alley and participated in beating him to the ground. Ruiz told the assistant State's Attorney that his companions said that they would have to kill the three

boys. After learning this, when they stopped in the second alley, Ruiz did not depart but stayed while each of the three was systematically and ruthlessly executed. Arthur Salcido was stabbed a total of eight times in the chest, and his throat was cut completely across, severing his windpipe, as well as the major arteries on either side of his neck. Frank Mussa was stabbed a total of 21 times: three times in the neck, three times in the chest and 15 times in the back. Michael Salcido was stabbed a total of 18 times: 10 times in the face and neck, five times in the abdomen and three times in the back. Ruiz never told either Lopez or the assistant State's Attorney that he protested while all of these blows were being struck. In fact, nothing in the record shows what he was doing during the considerable time that it took to perform these acts, which must have been accomplished in the face of extreme effort on the part of the victims to preserve themselves and through greater efforts on the parts of the participants to overcome the victims' defenses. In any event, when all was finished, Ruiz assisted the others in wiping the car free of fingerprints and then walked away from the scene with his companions. Even without considering the testimony of Lopez that Ruiz said he held a gun on the victims and felt their bodies to see if they were dead, the evidence is sufficient to prove Ruiz guilty of three murders beyond a reasonable doubt, along with the necessary intent required to establish the aggravating factor set forth in section 9–1(b)(3).

The defendant also contends that the indictment did not sufficiently inform him that the death penalty would be sought. In *People v. Brownell* (1980), 79 Ill. 2d 508, *appeal dismissed* (1980), 449 U.S. 811, 66 L. Ed. 2d 14, 101 S. Ct. 59, this court held that the charge in the indictment constitutes sufficient notice that the death penalty would be sought. Although Ruiz acknowledges that he was charged with killing three people, which, under the statute,

would make him eligible for the death penalty, he contends that the statute removes accountability convictions from the death penalty. Therefore he argues that the charge failed to inform him that the death penalty would be sought. Since our statute provides that a person convicted of felony murder is not subject to the death penalty unless he actually did the killing, Ruiz argues that this provision of the statute, by implication, prohibits the imposition of the death penalty where one is convicted of murder on the basis of accountability. This argument has been disposed of by our holding above that section 9—1(b)(6) does not remove accountability convictions as a foundation for the death penalty. Consequently, based upon *Brownell*, the defendant was sufficiently informed that the death penalty would be sought.

It is appropriate to distinguish the result here reached from another recent decision of this court. In *People v. Gleckler* (1980), 82 Ill. 2d 145, we vacated the death sentence imposed by a jury partly because of the mitigating factors presented and the extent of the defendant's participation relative to his codefendants'. In *Gleckler*, although the accused did in fact fire shotgun blasts into the heads of two young boys, his overall involvement in the episode was shown to be that of a follower. A great deal of evidence was produced in mitigation to show the accused's limited mental capacity, his docile personality, and his "definite propensity to go along with whatever events were happening at the time." (82 Ill. 2d 145, 164.) It was also established that the defendant was an alcoholic and that he had been drinking on the night of the murders. We also considered that Gleckler did not have a criminal record. These factors in mitigation, coupled with the fact that Theodore Parsons, charged with the same murders and far more culpable than Gleckler, received only a prison term, led a majority of this court to conclude that "Gleckler, with no criminal history, the personality of a doormat, and a prob-

lem with alcohol, was not the ringleader in this sordid affair; nor are his rehabilitative prospects demonstrably poorer than those who received imprisonment terms. Our revulsion toward this crime and our lack of sympathy for Gleckler cannot justify executing only him." *People v. Gleckler* (1980), 82 Ill. 2d 145, 171.

By contrast, the trial judge in this case was presented with no mitigating factors other than the testimony of one police officer to whom the defendant had expressed remorse and the argument of counsel that Ruiz did not take an active part in the crime because he feared for his own life. However, although Ruiz did not stab the victims, he was not a "follower" or a "doormat." We believe the inference that he actively participated in and directed the commission of crime could easily have been drawn by both the jury and the judge during the sentencing hearing. It is inconceivable that these three victims would calmly submit to their own systematic slaughter without resistance. It would likewise be absurd to preclude the inference that *all* of the perpetrators actively participated in overcoming such resistance by restraint and other acts of violence until each victim was finally killed. We cannot, therefore, reverse the trial court's ruling that no mitigating factors sufficient to preclude the death penalty had been proved. We believe that imposing the ultimate penalty of death based upon the evidence presented against Ruiz and the inferences properly drawn therefrom does not amount to cruel and unusual punishment. Nor is this case like *Gleckler*, where sufficient mitigating factors precluded imposition of the ultimate penalty.

Finally, the defendant asserts that the court improperly considered evidence in aggravation. At the sentencing hearing, both sides stipulated that if the State called all of its witnesses previously produced at trial, they would testify similarly. Thereafter, the State introduced testimony establishing that Thomas Griebell, age 16, died as a result

of a gunshot wound to the head which he received on July 13, 1976. The State next called an assistant State's Attorney who laid the foundation for introduction of a statement, signed by Luis Ruiz, that admitted in great detail the events of July 13, 1976. The document related in essence that Luis Ruiz fired a rifle from a gangway into a crowded parking lot across a street and thereafter saw a person in the parking lot grab his head and fall to the ground. This act was done in furtherance of plans made earlier that day by Ruiz and others to "hit a Royal." The parking lot into which Ruiz fired was adjacent to a restaurant used as a meeting place for members of that gang. The defendant objected to the introduction ofthis document and now contends that, since no conviction resulted from the alleged event, it was error for the court to consider it. In *People v. La Pointe* (1981), 88 Ill. 2d 482, we discussed this question in detail and held that a judge conducting a sentencing hearing is not limited to considering evidence that would only be admissible during a trial but could exercise wide discretion in the types of evidence used to assist him in determining the punishment to be imposed. The defendant's argument in our case is clearly answered by the statute. Section 9—1(e) provides that during the sentencing hearing any evidence relative to the aggravating factors set out in subsection (b) (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b)) may be presented "under the rules governing the admission of evidence at criminal trials." This section further provides that any additional aggravating factor may be presented "regardless of its admissibility under the rules governing the admission of evidence at criminal trials." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(e).) The evidence objected to did not pertain to an aggravating factor set out in subsection (b). The rules governing the admissibility of evidence at criminal trials therefore would not apply to this statement of the defendant. The statement was

properly admitted for the consideration of the trial judge in determining the penalty to be imposed.

This case has been held under advisement pending the filing of an opinion by the United States Supreme Court in *Enmund v. Florida* (1982), ___ U.S. ___, 73 L. Ed. 2d 1140, 102 S. Ct. 3368. The holding of the majority in that case is stated as follows:

> "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not." ___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1151, 102 S. Ct. 3368, 3376-77.

In *Enmund v. Florida* the court emphasized that the focus must be on the culpability of the defendant Enmund, not on that of those who, during the course of the robbery, shot the victims. Enmund was a robber and aided and abetted a robbery, in the course of which murder was committed by others. Enmund's criminal culpability was thus limited to his participation in the robbery and his punishment was tailored to his personal responsibility and moral guilt. (___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1152, 102 S. Ct. 3368, 3377.) The evidence showed that Enmund, although intending to participate in the robbery of the victims, stayed in an automobile while his two accomplices approached the victims' home, robbed them and then killed both victims after one of them had shot and wounded one of the accomplices.

> "Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder." ___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1152, 102 S. Ct. 3368, 3377.

We have detailed above the participation of Luis Ruiz in the three murders involved in this case. In *Enmund v. Florida* the defendant was found guilty of *felony* murder solely on the basis of his participation in the commission of the felony, robbery. In our case Ruiz was not tried or convicted on the theory of felony murder. We noted above in this opinion that, under our statute, the death penalty cannot be imposed for felony murder unless the defendant actually kills the victim. (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1(b)(6)(a).) In our case Ruiz was present throughout the violent episode, actively participated, except for striking a fatal blow, and his conduct was such as to support an inference that he possessed the intent to take the lives of the victims.

Nothing in the holding or the language of the majority opinion in *Enmund v. Florida* requires a conclusion in this case contrary to that reached above.

For the reasons stated, the judgments of conviction and sentence of death of the circuit court of Cook County are affirmed. The clerk of this court is directed to enter an order fixing Wednesday, March 16, 1983, as the date on which the sentence of death entered in the circuit court shall be executed. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and the wardens of the Illinois State Penitentiary at Menard and Joliet.

Judgment affirmed.

JUSTICE SIMON, dissenting:

I dissent from the imposition of the death sentence for the reasons set forth in my dissent in *People v. Lewis* (1981), 88 Ill. 2d 129, 179 (Simon, J., dissenting). I also dissent from the majority's holding that the death penalty statute (Ill. Rev. Stat. 1979, ch. 38, par. 9—1) covers defendants such as Luis Ruiz who are convicted of murder under the theory of accountability. My judgment is that the intent of the legislature and the plain language of the statute restrict the scope of the death penalty to defendants who kill or who actually possess the intent required for murder, and exclude from its coverage those individuals who are convicted of murder under a theory which does not require that they do the killing and under which "intent" to kill may be imputed.

The death penalty provisions appear in subsections (b) and (c) of the murder statute, which is section 9—1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b), (c).) Subsection (a) of the statute, to which the next two subsections refer, does not mention accountability or imputed intent other than through felony murder, and in fact states clearly that "[a] person who kills an individual without lawful justification commits murder if, *in performing the acts which cause the death* ***." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a).) The crime of murder by accountability is not defined in section 9—1, or anywhere specifically in the Criminal Code of 1961; instead, it derives from sections 5—1, 5—2 and 5—3 of the Code (Ill. Rev. Stat. 1979, ch. 38, pars. 5—1, 5—2, 5—3) by applying those sections in conjunction with the murder statute. The placement of the death penalty provisions within the murder statute rather than as a separate section, combined with the introductory language of the murder statute which I have quoted, suggests that the death penalty was never meant to be imposed on a person who committed none of the acts which caused the victim's

death and who can be convicted of murder only by means of accountability.

This conclusion is bolstered by the wording of the statutory sections involved. Subsection (b) of our murder statute sets forth eight aggravating factors the presence of which will permit the death penalty to be imposed. Except for the fifth factor, which involves the hiring of another to perform a murder, only one of the factors enumerated allows death for a murder in which the defendant did not personally do the killing. The sixth aggravating factor, which pertains to felony murder, is the only one which could even remotely involve a defendant who, like Ruiz, neither "perform[ed] the acts which cause[d] the death" nor was convicted on a theory of murder which requires the actual, as opposed to the imputed, intent to kill. Yet that factor is specifically limited in its application to cases where "the murdered individual was *actually killed by the defendant and not by another party to the crime* or simply as a consequence of the crime" (emphasis added) (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(6)(a)), regardless of the nature of the underlying felony, or even the extent of the defendant's involvement in that felony or the intensity of his intention that the victim should die. It is significant that the third aggravating factor, which pertains to murders of two or more individuals, requires that the defendant have the "*intent* to kill more than one person" or that the deaths result from "separate *premeditated* acts" (emphasis added) (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3)), neither of which conditions is met where the theory under which defendant was convicted permits his intent to be imputed. Not one aggravating factor pertains to defendants like Ruiz who do not do the actual killing and who must be prosecuted for murder under a theory such as accountability which allows the element of murderous intent to be supplied vicariously. The fact that the legislature specifically rejected or modified more inclusive forms of factors (6) and (3) in enacting

the limiting provisos I have mentioned is strong evidence that it intended not to countenance so broad an application of the death penalty. See 1 H.R.J., 80th Ill. Gen. Ass'y, at 316-18 (1977) (factor (6)); 1 Legislative Synopsis & Dig., 80th Ill. Gen. Ass'y, at 955 (1977) (factor (3)).

The majority attempts to demonstrate a contrary intent by pointing to one of the mitigating factors set forth in subsection (c) of the murder statute. Its reasoning is that there would be no need to provide that absence during the commission of the acts causing death may be considered in mitigation (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(c)(5)) if accountability were not a basis for the imposition of the death penalty. This argument assumes that a defendant who is absent during the commission of the fatal acts cannot be charged with murder directly under the provision of the murder statute without resorting to accountability theories. I question the soundness of this assumption. As I have noted, one who solicits the killing of a victim does not do the actual killing; he need not be at the scene of the crime. Yet I see no reason why he cannot be prosecuted directly for murder. His intent to kill is real and need not be imputed; the act of soliciting another to perform the murder may well qualify as an "[act] which cause[s] the death" (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)). In fact, as I have also noted above, the murder statute specifically allows the death penalty to be imposed on one who solicits the murder of another. (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(5).) I fail to see why the mitigating factor relied on by the majority cannot apply to such a person, or why the factor must be construed as applying to persons merely accountable for the murderous acts of others in order to have meaning.

This court should not permit a person to be sentenced to death when all that it can determine is that there is a strong possibility, or even a probability, that the death penalty statute applies to his conduct. Our practice has been to

interpret criminal statutes and punishment-enhancing provisions with lenity, and to resolve each and every ambiguity in the reach of such provisions in favor of the defendant. (See, *e.g.*, *People v. Hobbs* (1981), 86 Ill. 2d 242; *People v. Haron* (1981), 85 Ill. 2d 261, 277-78; *People v. Lund* (1943), 382 Ill. 213, 215-16.) This practice should be followed with particular rigor in interpreting the death penalty statute, not only because of its severity but also because of its irrevocability. In this case the statute does not extend on its face to the grounds on which the defendant was convicted of murder, and further inquiry into the various aggravating and mitigating factors leaves room for considerable doubt as to whether the statute was ever intended to extend to those grounds. My interpretation is that such an intent did not exist. To the extent that this interpretation is disputable all doubts should be resolved in favor of the defendant. An inasmuch as the majority's attempt to make the death provision cover accountability cases depends on a labored construction of a mitigating factor which is probably not obvious to most laymen, the court should at the very least have given careful consideration to Ruiz' claim that the indictment did not sufficiently inform him that the death penalty would be sought, rather than dismissing it in two brief sentences as it did.

Traditionally, the courts of this State have adhered to the maxim that "[t]he degree of activity or participation in a crime should receive attention in fixing the sentence" (*People v. Colone* (1978), 56 Ill. App. 3d 1018, 1022; see *People v. Viser* (1975), 62 Ill. 2d 568, 586-87; *People v. Morris* (1969), 43 Ill. 2d 124, 131; *People v. Parish* (1980), 82 Ill. App. 3d 1028, 1033-34; *People v. Mikel* (1979), 73 Ill. App. 3d 21, 32). Accountable accomplices have generally been given lesser sentences than principal perpetrators in accordance with this maxim, even though both are guilty of the crime. (See, *e.g.*, *People v. Parish* (1980), 82 Ill. App. 3d 1028 (affirming disparate sentences because appel-

lant was the principal perpetrator); *People v. Mikel* (1979), 73 Ill. App. 3d 21 (same); *People v. Colone* (1978), 56 Ill. App. 3d 1018 (reducing appellant's sentence because he was merely an accountable accomplice).) While Ruiz may not have been a "doormat" (*People v. Gleckler* (1980), 82 Ill. 2d 145, 164), neither was he a principal in the three murders for which the death penalty is being sought. I respectfully suggest that the majority should have considered this at greater length, both in exercising review of the sentence imposed in this case and in deciding whether the legislature, in enacting a capital punishment statute silent on its face regarding accountability, really intended to allow infliction of the ultimate penalty upon anyone but ultimate murderers. I would reverse the death sentence and remand for resentencing.

APPENDIX E

Docket No. 54276—Agenda 1—March 1982.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. GIRVIES L. DAVIS, Appellant.

JUSTICE MORAN delivered the opinion of the court:

Defendant, Girvies Davis, was indicted with a codefendant, Richard Holman, age 17, in the circuit court of St. Clair County for one count of murder in violation of section 9—1(a)(1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(1)). The causes were severed, and the charges against Holman were later dismissed pursuant to a motion by the State. Defendant was tried by a jury and found guilty of murder. At a separate bifurcated sentencing hearing, the same jury unanimously determined that the necessary aggravating factors existed, and that there were no mitigating circumstances sufficient to preclude imposition of the death penalty. The jury returned a verdict directing that defendant be sentenced to death, and the court entered judgment on the verdict. Defendant's post-trial motions were denied, and he brings a direct appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 73 Ill. 2d R. 603), alleging numerous errors in all stages of the proceedings.

The evidence adduced at trial indicates that on Friday, December 22, 1978, the victim, 89-year-old Charles Biebel, was shot to death in his mobile home located off Route 161. Jean Biebel Moore, the daughter of the deceased, testified that she discovered her father's body at 4 p.m. She stated that two watches, a billfold, "a number of guns," and a television set had been taken from his home. On cross-examination, she indicated that she had offered a

$5,000 reward for information leading to the arrest and conviction of her father's murderer.

Gregory Mitchell, who testified that he was a "fence," stated that in late January of 1979, the defendant phoned him and said "we might have something for [you] later on." That evening, Holman brought Mitchell a gun. Mitchell further stated that he saw defendant later that same night, and defendant inquired as to how much money Holman was paid for the gun. He also testified that he again saw defendant on September 10, 1979, in the company of police officers. At that time, defendant told him to turn over to the police "any of the guns or T.V.'s" because Holman accused him of "doing some crimes."

Mitchell stated that a police officer gave him money to buy back the gun which he had sold to another individual. He did so, and the weapon was introduced into evidence at trial. Mitchell identified the gun as the one he purchased from Holman. One of the victim's neighbors, William Imboden, testified that this weapon belonged to the victim.

The State was permitted at trial to introduce evidence of two other murders for the limited purpose of showing defendant's *modus operandi*. One of the victims, Frieda Mueller, was 78 years old at the time of her death. She lived off Route 163. Mueller was found shot to death on the afternoon of Friday, December 8, 1978. A television set, billfold and checkbook were stolen. Evidence of this crime, which occurred two weeks prior to the Biebel murder, was also admitted to show defendant's knowledge that a murder was contemplated because previously, under similar circumstances, a murder did take place.

Similarly, Esther Sepmeyer was an elderly woman who lived in a rural area off Route 162. Her grandson, Rodney Sepmeyer, testified that Mrs. Sepmeyer was shot to death on Friday, July 13, 1979. A television set, replica antique radio, stereo, lawnmower and a .22 Remington rifle were taken from the home. The lawnmower and radio were in-

troduced into evidence and identified by the witness. These items had been recovered from defendant's home pursuant to a search warrant. The witness also drew a picture detailing the inside of the victim's home. Further evidence disclosed that a latent fingerprint recovered from the home belonged to Holman. No fingerprints matching defendant's were found.

James Lay, chief investigator for the St. Clair County sheriff's department, testified that pursuant to defendant's request, he spoke with him at approximately 10 p.m. on September 9, 1979. Defendant was read his *Miranda* rights and signed a form indicating that he understood them. Defendant then stated that he had information regarding certain murders in which he was involved. The defendant gave Lay a list of crimes involving robberies, burglaries and shootings. He disclosed various locations at which evidence of the crimes could be found, but none of the items described were recovered. Pursuant to defendant's description, Officer Lay drew a sketch of the inside of the Sepmeyer home. This picture was later circulated to the jury along with the sketch drawn by Rodney Sepmeyer. Lay further testified that on September 10, 1979, defendant dictated three statements to police officers admitting complicity in the Sepmeyer, Mueller and Biebel murders. On cross-examination he stated that six months earlier defendant had denied involvement in the Biebel murder and had stated that he could not locate the victim's home.

The defendant's statements regarding the Biebel, Mueller and Sepmeyer murders were read to the jury. Defendant gave the following statement concerning the December 8, 1978, Mueller murder:

> "Me, Girvies L. Davis, and Richard Holman drove my blue '70 Buick to a farm house off of Route 163 on the Centreville side of Millstadt. We turned to the right on a back road and pulled up in the driveway to the left. We

got out of the car and went to a side or back door and pushed it open. This door opens into the kitchen. Once we got in, an old lady was coming towards us from the bedroom. I started to search the house when Ricky told the old lady to sit in a chair in the kitchen. We took some items, I think a T.V. from the kitchen. While I was taking the T.V. out to the car, Ricky said he shot her in the back. I heard the shot from outside. The lady was sitting at a small desk in the kitchen. He took some items, I think a T.V. from the kitchen. *** Ricky took a black man's wallet from the desk drawer ***."

With reference to the December 22, 1978, Biebel murder, defendant dictated the following statement:

"Sometime in 1978, I don't remember exactly, me and Richard Holman drove up to a mobile home by a church. I was driving my blue Buick, 1970 model. We stopped in the driveway of the trailer. We got out of my car and we walked to the trailer. The front door was open, so we walked in. There was an old man sitting in a wheelchair facing the front door. I asked him where the money was. He said he didn't have any. We took a double barrel shotgun and a T.V. I was in the bedroom in the front room, and inside of the trailer was the kitchen on the right of the front door. Then the living room, then a bedroom down the hall to the left. The T.V. was in the front room, and the shotgun was in the bedroom. I carried the T.V. and gun out to the car. Then I heard a shot and Ricky came out and said he shot the old man. He sold the T.V. and gun somewhere but I can't remember where."

Regarding the circumstances of the July 13, 1979, Sepmeyer murder, defendant stated:

"[A]bout two months ago a friend of mine by the name of Ricky Holman who also goes by the name of Ricky Shaw, and I were driving in my 1970 Buick 225. We were driving on the interstate and I remember seeing a sign that said, St. Jacob on it. We drove past this and then we exited the highway by some service stations. We drove down this road until we came to an old house. It was sitting on the right side of the road. This house had a barn

sitting in the back. I drove into the driveway and drove to the back of the house with the front of the car facing the back door. Both Ricky and I got out of the car and went up to the back door. I can't remember if we had to force the door open or not, but we went into the house. The back door leads into a kitchen and from the kitchen I could see that there was an old lady laying in a bed in a bedroom next to the kitchen. Ricky and I both walked into the bedroom right away. I went into the bedroom for a short time and then I started looking around the rest of the house and Ricky stayed in the bedroom. After I left the bedroom, I walked into the dining room and then in the spare room, and then into a hallway. The hallway had stairs leading to the upstairs but I never went upstairs. In the spare room there was a lawn mower, it was yellow with a three and a half h.p. motor. I took the handle off this lawn mower and then I carried it outside and put it in the trunk. While in the back room, I saw a motor thing with a black hose on it. I believe it was used to suck water and things up, but I didn't take it. In the hallway there was a turn table sitting on a heater. I can't recall what name it was, but it had a plastic top and it had a top on it and I loaded it into the car. After I loaded the record player in the car, I came back in and got a T.V. that was sitting in the kitchen. The T.V. was sitting on a table just to the right of the door when I walked into the kitchen the T.V. was a little white T.V. with black trim around it and it's a color T.V. When I first went into the bedroom with Ricky, I found a .22 new rifle in a box. This gun was in a cabinet in the bedroom and there were also some shells with it. I loaded the gun and gave it to Ricky. When I was outside putting the T.V. in the car, I heard a gunshot and when I got back in the bedroom, the old lady was shot and she was laying on the bed. At the time I told Ricky, let's get out of here. Again when I first went in the house, I saw an antique type radio in the bedroom and I unplugged it and sat it in the kitchen table. Just as we were leaving the house the last time, I grabbed the radio and took it. Ricky never said why he shot the lady and I never asked. The old lady in the house looked very

old and I think she was wearing a long flowered type dress. Early, while Ricky and I were in the house, Ricky asked me what we were going to do with the old lady and I told him, just leave her because she couldn't identify us. After we left the house, we drove to Perry's Lounge at 9th and Exchange in East St. Louis. I believe we sold the T.V. set there for about Eighty Dollars. After we left Perry's Lounge, we drove up to the pay bridge and we drove halfway across and then Ricky threw the .22 rifle into the river. The lawn mower and radio I kept at my house and I'm not sure where the record player went to. I understand that I have the right to talk with a lawyer and have him here. But I want to turn State's evidence and get exactly, get everything off my mind."

Defendant called as witnesses Dennis Kuba and Gerald Johnson, two special agents with the Illinois Division of Criminal Investigation. They testified that Lawrence and Harris, two men with whom defendant shared a cellblock, were convicted of other crimes to which defendant confessed. (The theory of the defense was that defendant merely heard about the Mueller, Biebel and Sepmeyer murders from his cellmates and, for some reason, confessed to being one of the perpetrators). Kuba also testified that Lawrence and Harris were not in custody on the date the Biebel and Mueller murders were committed. On cross-examination, Kuba stated that Lawrence and Harris were in custody at the time of the Sepmeyer murder.

The final defense witness, a friend of defendant, identified the lawnmower and radio taken from the Sepmeyer home. He stated that, while he was at defendant's home, defendant bought these items from his cousin. On cross-examination, the witness testified that he could not hear the conversation, but he saw the defendant hand his cousin some money after looking at the items.

The first issue we address is whether the State's use of peremptory challenges to allegedly obtain an all-white jury deprived defendant of his right to a fair and impartial jury.

This contention has been resolved adversely to the defendant in *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824. In *Swain*, the Supreme Court held that, in a particular case, the prosecutor may constitutionally exercise his peremptory challenges to eliminate blacks from the jury. (380 U.S. 202, 223, 13 L. Ed. 2d 759, 774, 85 S. Ct, 824, 837; accord, *People v. Gaines* (1981), 88 Ill. 2d 342, 358, *cert. denied* (1982), ___ U.S. ___, 73 L. Ed. 2d 1295, 102 S. Ct. 2034; *Commonwealth v. Henderson* (1981), 497 Pa. 23, 438 A.2d 951.) Only a systematic and purposeful exclusion of blacks from the jury, "in case after case" raises a question under the fourteenth amendment. (*Swain v. Alabama* (1965), 380 U.S. 202, 223, 13 L. Ed. 2d 759, 774, 85 S. Ct. 824, 837.) Defendant has the burden of producing some evidence establishing a systematic exclusion (*People v. Powell* (1973), 53 Ill. 2d 465, 477-78), and he has not met that burden here.

The evidence indicates that three prospective black jurors were peremptorily challenged by the State. The record does not reveal the number of black jurors called for service. Nor is there evidence that the jurors were necessarily excluded because of their race. In objecting to the jury panel, defense counsel merely stated: "I believe the number of the jurors which were black were excused by the State." Defendant's post-trial motion for a new trial simply alleged that three black jurors were peremptorily challenged by the State.

We recognize that at least two States, California and Massachusetts, have rejected the *Swain* holding. These courts have concluded that if defendant makes a *prima facie* showing that veniremen were excluded because of race, the prosecution has the burden to prove the exclusion was based on other grounds. (*Commonwealth v. Soares* (1979), 377 Mass. 461, 387 N.E.2d 499, *cert. denied* (1979), 444 U.S. 881, 62 L. Ed. 2d 110, 100 S. Ct. 170; *People v. Wheeler* (1978), 22 Cal. 3d 258, 583 P.2d 748, 148 Cal.

Rptr. 890.) However, we are not disposed to depart from the principle enunciated in *Swain*. "Peremptory challenges, historically and by definition, are arbitrary and perhaps even irrational challenges to the seating of a juror. They are totally subjective and not subject to scrutiny or examination. *** [T]he Court in *Swain* pointed out that to entertain objections of the nature raised in this case would be to destroy the peremptory nature of the challenge ***." *Commonwealth v. Henderson* (1981), 497 Pa. 23, 29-30, 438 A.2d 951, 954.

Defendant further contends that he was denied a fair trial when the prosecutor, over a defense objection, allegedly questioned prospective jurors about their willingness to follow the law of accountability. It is clear that during *voir dire* "[q]uestions shall not directly or indirectly concern matters of law or instructions." (73 Ill. 2d R. 234.) Two of the jurors who were ultimately selected were asked the following question:

> "Mr. Kuehn [State's Attorney]: Now, there's going to be—there's going to be evidence involved in this case of a co-defendant, another defendant apart from this defendant. Some of the evidence will pertain to that co-defendant and how it relates to this defendant's case, and evidence that runs to this defendant. The law in certain instances would provide that a person would be held responsible for the acts of a co-defendant, a cohort in crime.
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> • • •
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> *** The Court will instruct you about this, this aspect of the law, that a person can be held accountable and responsible for the acts of another. Would it affect your ability in deciding this case on the issue or the charge of murder provided that the law states that the defendant could be held accountable under the facts that the defendant, this defendant before you, did not do the direct act, did not pull the trigger of the gun so to speak, that caused the death of the individual. Do you think that

would affect your ability to decide or could you follow that law?"

The prosecutor did not instruct the jury as to the applicable law. Rather, he merely inquired as to whether the jurors could follow the law even if the evidence revealed that the defendant did not actually do the shooting. We do not agree that the quoted comment improperly concerned the law of accountability.

Defendant next contends that exclusion of veniremen for cause, pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, improperly results in a conviction-prone jury. We have consistently held to the contrary (*e.g., People v. Lewis* (1981), 88 Ill. 2d 129, 147, *cert. denied* (1982), ___ U.S. ___, 73 L. Ed. 2d 1308, 102 S. Ct. 2307), and recently affirmed our prior holdings. *People v. Tiller* (Dec. 17, 1982), No. 53260; *People v. Free* (Jan. 24, 1983), No. 52775.

Defendant's final assignment of error with respect to the *voir dire* concerns the trial judge's refusal to excuse a juror for cause. Defense counsel, in his opening remarks, informed the jury that defendant had been in jail with two men who were convicted of attempted murder in connection with the robbery of a gas station. He further indicated that certain tests revealed that the gun used in the robbery had also been used in a murder at the Mexico City Cafe, and may have been the weapon used to kill Frieda Mueller.

After Jean Biebel Moore testified, the court recessed. During this recess, a juror, Mr. Lewis, informed the court that a friend of his was related to someone who was murdered during the Mexico City Cafe incident. The judge asked Mr. Lewis if that incident would affect his decision in the case, and he responded:

"Well, the only thing I can say there is that at the time, like I say, this individual and I became close friends ***. He was pretty bitter about the incident because he would have been there had he stopped, he apparently de-

cided to go home that night. I would like to say, no, that I can keep an open mind on it, but I don't know at this time. But I do know that he was very bitter at the time."

He further stated, in response to an inquiry by defense counsel, that any decision he made would not result in embarrassment to him because of his friendship. When asked if he could put the incident completely out of his mind and arrive at a fair verdict, Mr. Lewis replied:

"I don't think I could ever put it totally out of my mind because it was somebody near to me and I'm not used to this type of situation. But I think for this case, since it is a separate case, I think I could look at this case—the only reason I brought it up is because it was made mention and I do recall the incident."

He also indicated that he was not personally acquainted with the victim. Following this exchange, defense counsel requested that Mr. Lewis be excluded from the jury and replaced by one of the alternate jurors. The court denied this request.

It cannot be said that the judge erred in permitting Mr. Lewis to serve as a juror. The trial judge is in a superior position to observe the veniremen's demeanor. (*Cf. People v. Gaines* (1981), 88 Ill. 2d 342, 357 (trial judge is in a superior position to determine a veniremen's attitude toward the death penalty).) Although initially equivocal and hesitant, Mr. Lewis' final response indicated that he could view defendant's trial as a "separate case." The fact that he could never put the incident completely out of his mind does not reflect on his impartiality with respect to this trial. See *People v. Szabo* (Jan. 24, 1983), No. 52626 (prospective juror should not have been excluded, pursuant to *Witherspoon*, because of equivocal and tentative statements concerning her ability to impose the death penalty).

Defendant further alleges as error the prosecutor's reference, in his rebuttal closing argument, to the Mueller and Sepmeyer murders. In closing argument, defendant

frequently insinuated that the police officers fabricated the confessions attributed to defendant, that they committed perjury, and that defendant was innocent. In rebuttal, the prosecutor basically stated that he was not prosecuting defendant because he was innocent, or because he was an "altar boy." The prosecutor then stated:

> "Mr. Kuehn: Why do we [the State and police officers] want [the defendant]? Because there are only three rural killings of old people, defenseless old decrepit, aged people, in 1979, and the last one was Sepmeyer, and he details them all, and he's a good friend of Ricky Holman, and they were out killing. That's why we want him."

Defendant objected to this comment. He does not argue in this court that the "other crimes" evidence was improperly admitted, but rather that it was argued for an improper purpose. He contends that the prosecutor's comment indicated that defendant should be found guilty of the Biebel murder because he was involved in two other murders. The State urges that, considering the comment in its context, the statement merely refers to defendant's knowledge and *modus operandi*.

Even if we were to agree with defendant, still, there would be no reversible error. The comment was "not so inherently prejudicial that no instruction could have corrected the situation." (*People v. Lewis* (1981), 88 Ill. 2d 129, 149.) Here, the trial judge carefully instructed the jury that the evidence pertaining to the Mueller and Sepmeyer murders had "been received solely on the issue of the defendant's design and knowledge" and was to be considered only for that limited purpose.

Defendant has filed a *pro se* brief raising numerous issues concerning the guilt phase of the proceedings. We will address those contentions which were not raised by defense counsel. Defendant asserts that his right to a speedy trial was violated and cites sections 103—5(a) and (b) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977,

ch. 38, pars. 103—5(a), (b)). These provisions state that a defendant must be brought to trial within 120 days from the date he was taken into custody, or, if defendant is not in custody, within 160 days from the date he demands trial. Neither of these subparagraphs are applicable in the instant case since they involve situations in which a person is charged with a single offense. The relevant statutory provision is section 103—5(e), which states in part:

> "If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried, or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by sub-paragraphs (a) and (b) of this Section. Such person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which judgment relative to the first charge thus prosecuted is rendered pursuant to Section 118—1 of this Act or, if such trial upon such first charge is terminated without judgment and there is no subsequent trial of *** such first charge within a reasonable time, the person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which such trial is terminated; if either such period of 160 days expires without the commencement of trial of *** any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of prosecution unless delay is occasioned by the defendant ***." Ill. Rev. Stat. 1977, ch. 38, par. 103—5(e).

The relevant records have not been supplied to us in this proceeding. In order to resolve this issue, we will examine the records in defendant's other murder trials from the pleadings, pertaining to such cases, contained in the record before us.

The defendant was taken into custody on August 30, 1979, on one of the three pending murder charges. He con-

ceded, during the pretrial hearing, that he was brought to trial on the initial murder charge within the prescribed time period. He was found guilty, but on either February 2 or 4, 1980, the trial judge granted defendant a new trial. Following a substitution of judges, the retrial began on March 24, 1980, and resulted again in a guilty verdict rendered on March 27. Post-trial motions were denied on May 2, 1980, and defendant was apparently sentenced on that date.

On March 10, 1980, prior to the retrial on the first charge, defendant was tried on the second murder charge. He was convicted on March 11, and sentenced on April 25, 1980. His trial on the instant charge was scheduled to commence on August 25, 1980. However, on August 22, defendant moved for a change of venue, which motion was granted. The trial judge scheduled trial for October 20, 1980, in a different county. On September 19, defendant withdrew his motion for a change of venue, and the trial was rescheduled in St. Clair County for the week of October 14, 1980. Numerous pretrial motions were filed by defendant and argued on October 10 through 16. The jury was selected on October 20, after which the trial began.

As quoted above, section 103—5(e) states that a defendant "shall be tried upon all of the remaining charges thus pending within 160 days from the date on which *judgment* relative to the first charge thus prosecuted is rendered pursuant to Section 118—1 of this Act." (Emphasis added.) Although section 118—1 has been repealed (in a manner that has no bearing on the disposition of this issue) "judgment" is defined in section 102—14 of the Code of Criminal Procedure of 1963 as "an adjudication by the court that the defendant is guilty or not guilty and if the adjudication is that the defendant is guilty it includes the sentence pronounced by the court." (Ill. Rev. Stat. 1977, ch. 38, par. 102—14.) The term "judgment," as used in section 103—5(e), refers to the date upon which defendant was

first sentenced, and not the date upon which he was granted a new trial. See also *People v. Allen* (1978), 71 Ill. 2d 378, 381; *People v. Martin* (1976), 44 Ill. App. 3d 207, 208; *People v. Ike* (1973), 10 Ill. App. 3d 933, 934.

The first trial ended in a new trial, and therefore there was no judgment. Consequently, defendant received his first sentence on April 25, 1980. The State had 160 days from that date in which to try defendant for the instant offense. Defendant's August 22 motion for a change of venue was clearly a delay occasioned by defendant and operated to toll the statute. (See Ill. Rev. Stat. 1977, ch. 38, par. 103—5(f).) On that date, 119 days had lapsed since April 25. The statute commenced running again, at the earliest, on September 19, when defendant withdrew his motion for change of venue. It was later tolled from October 10 through 16, when defendant's pretrial motions were argued. Four more days lapsed from October 16 until the trial commenced. According to our calculation, the limitations period had run for 144 days. This is within the 160-day limit prescribed by the statute.

At the pretrial hearing, defendant also alleged that he was not retried on the first murder charge within a reasonable time, as required by section 103—5(e). Although there was approximately a seven-week delay between trials, we agree with the trial judge that this was not unreasonable in view of the circumstances. Defendant had at least three murder charges pending and was tried on one such charge prior to his retrial. This is not, therefore, a situation in which the State "sat" on defendant's case without attempting to pursue any prosecution. For these reasons, we find that defendant's right to a speedy trial was not violated.

Defendant further contends that the indictment was insufficient because it charged him with murder when he was only guilty of home invasion or burglary. Clearly, the prosecutor has discretion to determine the offenses with

which a person shall be charged, and here the indictment was sufficient upon which to predicate a murder conviction.

Prior to trial, defendant moved for a substitution of judge on the grounds that this same judge presided over an unrelated murder trial of Holman. This motion was denied. After the jury returned a verdict imposing the death penalty, defense counsel inquired as to whether the judge could set aside the jury's verdict. The judge indicated that he need not determine whether he could substitute his judgment for that of the jury and stated: "*** Mr. Davis is a no-good, cold-blooded killer that doesn't deserve to live." Defendant contends that this post-trial statement proves that the judge had been prejudiced against him, and therefore his pretrial motion for a substitution of judge should have been granted.

Without commenting on the propriety of this statement, it does not indicate that the judge was predisposed against the defendant during trial. Our review of the record does not disclose any instances of inappropriate judicial behavior, or intentional unfair treatment of the defendant. Consequently, there was no error in disallowing a substitution of judge.

It is also contended that defendant's statements should have been suppressed because they were involuntary, and his right to counsel was violated. We disagree. Defendant's initial contact with Sergeant Lay, to whom he confessed regarding a number of crimes, was initiated by defendant himself. The evidence shows that defendant was advised of his *Miranda* rights, including the right to counsel, and he signed forms indicating that he understood them. Although, at a pretrial hearing, defendant testified that the police and certain inmates threatened and coerced him into confessing, there is no corroborating evidence to support this claim. Clearly, a question of credibility was involved,

and the trial judge was not required to believe defendant's version of events.

Nor was the court required to assume the confessions were involuntary because defendant was questioned from 10 p.m. on September 9, until 4 a.m. the following morning. Although defendant gave a written statement at 4 a.m., he indicated a willingness to discuss the crimes from the moment he met, at his own request, with Sergeant Lay. Indeed, as soon as the interview began, he handed Lay a list of crimes in which he claimed involvement. It has been held that "[t]he finding of the trial court on the voluntariness of a confession will not be disturbed unless it can be said that it is contrary to the manifest weight of the evidence." (*People v. Brownell* (1980), 79 Ill. 2d 508, 521, *appeal dismissed* (1980), 449 U.S. 811, 66 L. Ed. 2d 14, 101 S. Ct. 59, citing *People v. Aldridge* (1980), 79 Ill. 2d 87; *People v. Medina* (1978), 71 Ill. 2d 254, 258.) There was sufficient evidence from which the judge could conclude the defendant voluntarily, in all respects, gave the inculpatory statements. The judge, therefore, did not err by allowing the statements into evidence.

Defendant argues that his fourth amendment rights were violated when police officers executed a search of his home beyond the scope of the warrant. Evidence at the pretrial hearing disclosed that a search warrant was issued, authorizing the officers to seize a color television set from a front room in defendant's home. Probable cause for issuance of the warrant was based on statements given by Ricky Holman. The officers did not find the television set, but they did seize a gold watch and knife. Defendant's motion to suppress these items as evidence was granted.

While in the home pursuant to the search warrant (which defendant does not contend was improperly issued), an officer noticed a replica antique radio, a lawnmower and a stereo turntable. It subsequently became known that items similar to those found in defendant's home were re-

ported stolen from the Sepmeyer residence. A new search warrant was issued, authorizing a seizure of those items. Defendant claims that this seizure was improper because the officer's search should have been restricted to the room in which the television set was located.

If the items taken from the Sepmeyer residence were seized at the time they were discovered, the trial judge may well have suppressed this evidence, as he suppressed the watch and knife. However, they were not recovered by the police at that time; they were simply observed during the course of an authorized search. We therefore cannot say that the seizure of the items was invalid. In a related contention, defendant challenges the validity of the seizure on the grounds that he did not consent to the search. However, the search was conducted pursuant to a warrant, and his consent is therefore unnecessary. The case upon which defendant relies, *People v. Rinaldo* (1980), 80 Ill. App. 3d 433, is inapposite because it involved a warrantless search.

It is further asserted that certain police officers and the State's Attorney conspired to violate defendant's rights, and that the State's Attorney intimidated Mitchell into lying about the defendant in order to obtain a conviction. These conclusory allegations are not supported by the record and are without merit.

Defendant also contends that Mr. Kuehn or the police officers lied about his role in the Biebel murder in order to obtain the $5,000 reward which was offered by the victim's daughter. Although such a reward was offered, there is no evidence from which an inference of misconduct can be derived. Also without merit is defendant's argument that Mitchell should have been arrested as an accessory to the crime. Whether or not the State chooses to prosecute Mitchell is irrelevant to the disposition of defendant's case.

Defendant makes a conclusory statement that he was prejudiced by the introduction into evidence of the murder victim's pictures, the shotgun taken from his home, and

the "testimony." He offers no support for the allegation and our review reveals none.

Finally, defendant contends that a verdict should have been directed in his favor at the close of the State's case, and that the evidence was insufficient to support a conviction. The evidence, if believed by the jury, establishes that defendant contacted Mitchell concerning the purchase of a gun, which was delivered by Holman. The gun was one of the items taken from the deceased's home. Certain items stolen from another victim were recovered from defendant's home. Especially significant is defendant's inculpatory statement, in which he details the circumstances of the murder in such a manner as to clearly indicate that he was present during the commission of the offense. For example, he stated that the door to the Biebel home was unlocked, and the victim's daughter testified that it was left open during the daytime. He knew that the victim was confined to a wheelchair, and corroborated the daughter's testimony with respect to certain items taken. The only evidence presented by the defense does not raise a reasonable doubt as to defendant's guilt.

It is for the trier of fact to determine the weight and sufficiency of the evidence (*People v. Akis* (1976), 63 Ill. 2d 296), and that determination will not be reversed unless the evidence is so improbable as to create a reasonable doubt of defendant's guilt (*People v. Yarbrough* (1977), 67 Ill. 2d 222). From our review of the record, we find the evidence was more than sufficient to support a murder conviction. It follows that the judge did not err in denying defendant's motion for a directed verdict.

Having determined that no reversible error occurred during the guilt phase of defendant's trial, we next consider allegations of error at the sentencing proceeding. Defendant raises a number of contentions concerning the constitutionality of the death penalty statute which have been resolved. This court has determined that the statute

is not incompatible with article I, section 11, of the Illinois Constitution (*People v. Szabo* (Jan. 24, 1983), No. 52626; *People v. Gaines* (1981), 88 Ill. 2d 342); that the statutory grant of discretion and authority to the prosecutor is proper (*People v. Szabo* (Jan. 24, 1983), No. 52626; *People v. Brownell* (1980), 79 Ill. 2d 508; *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, *cert. denied* (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603); that the State need not prove, beyond a reasonable doubt, that there are no mitigating factors sufficient to preclude imposition of the death penalty (*People v. Free* (Jan. 24, 1983), No. 52775; see also *People v. Brownell* (1980), 79 Ill. 2d 508); and that the statute provides for adequate review to insure that sentences are not arbitrarily imposed. *People v. Kubat* (Jan. 24, 1983), No. 53726; *People v. Szabo* (Jan. 24, 1983), No. 52626; *People v. Brownell* (1980), 79 Ill. 2d 508.

Defendant next argues that the indictment was insufficient to support a death sentence because it failed to allege a statutory aggravating factor. In *People v. Brownell* (1980), 79 Ill. 2d 508, 524, it was held that "[a]n indictment's allegations must be set out with such specificity or particularity that the accused is informed of the offense with which he is charged and enabled to prepare his defense and, further, that he is protected against being later prosecuted for the same crime."

Defendant, charged with one count of murder, does not assert that the necessary elements of that crime were insufficiently alleged in the indictment. Since "there is only one offense of murder in Illinois; [and thus] no distinction is made between capital and non-capital murder" (*People v. Brownell* (1980), 79 Ill. 2d 508, 524; *People v. Kubat* (Jan. 24, 1983), No. 53726), defendant, when properly charged, is protected from being twice prosecuted for the same crime. The aggravating factors are not necessary elements of the *offense*, and are relevant only to a determination of

the appropriate *punishment*. Therefore, the real question concerns defendant's knowledge that the death penalty would be sought, and his ability to adequately prepare a defense. Had the State set forth in the indictment the aggravating factors upon which it would rely, notice would not be an issue. We therefore believe this procedure to be preferable.

When defendant raised this issue during the trial, the State responded:

> "MR. STURGEON [Assistant State's Attorney]: For the record, I would indicate that in response to a court order, an order of the Court, for a bill of particulars, the defendant prior to the commencement of this trial was advised of what the aggravating factors would be and what [*sic*] we would be seeking the death penalty, and so they would be apprised of it, which is the basis for what they are asking for, so I don't see any prejudice that would result from the failure to be in the indictment since they were fully advised prior to trial.
>
> THE COURT: Anything else?
>
> MR. YOUNG [Defense Counsel]: No."

Defendant did not deny the truth of the prosecutor's statement. Further, the bill of particulars requesting information concerning the State's intent to seek the death penalty was filed on October 7, 1980, prior to his trial. On October 16, 1980, he made a pretrial motion to declare the death penalty statute unconstitutional. Defendant does not allege that he was unaware of the aggravating factors upon which the State would rely. For these reasons, we find that he received sufficient pretrial notice of the aggravating factors. This is not, therefore, a situation in which the indictment either failed to specify aggravating factors or defendant received no pretrial notice. Since defendant was informed of the above facts, and has shown no prejudice as a result of the State's failure to specify aggravating factors in the indictment, we hold that the indictment was sufficient upon which to predicate the death penalty. (*Cf.*

People v. Gaines (1981), 88 Ill. 2d 342 (pretrial notice of the State's intent to seek the death penalty is not always required where the indictment apprised defendant that he could potentially be sentenced to death).) Defendant appears to recognize the shortcomings of his argument since he merely urges that we adopt the reasoning of the dissenting opinion in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, *cert. denied* (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603, and the partial concurrence and partial dissent in *People v. Greer* (1980), 79 Ill. 2d 103.

Defendant's next contentions concern the sufficiency of the State's proof with regard to the aggravating factors. During this stage of the sentencing hearing, the State introduced into evidence certified copies of two prior indictments and murder convictions. The documents indicated that a Girvies L. Davis was convicted for the murders of John Oertel and Frank Cash, and the attempted murder of James Ostman. In response to an inquiry by the prosecutor, an employee of the circuit clerk's office testified that the certified copies represented convictions of the defendant. Defense counsel did not cross-examine the witness as to the basis for her knowledge. Nor did he move to strike her testimony for failure to identify the defendant. However, he now alleges, as he did in a motion made while the sentencing jury was deliberating, that the State failed to establish that defendant is the same person named in the documents. He relies primarily on two appellate court cases for the proposition that an identical name in a document does not prove beyond a reasonable doubt the identity of the defendant as that person named in the document. *People v. Martin* (1981), 97 Ill. App. 3d 704; *People v. Langdon* (1979), 73 Ill. App. 3d 881.

It has been held that, in addition to the presumption which arises from the similarity in names, independent proof must be made that defendant is the same person

named in the certified records. (*People v. Casey* (1948), 399 Ill. 374, 378-79.) However, this court recently stated:

> "Earlier cases in this court would appear to preclude a judge from taking judicial notice of the orders or decrees entered in other cases in the court in which he presides. [Citations.] It has been repeatedly held that proof of prior convictions should be by means of certified copies of the record and identification of the defendant in the prior case as the same person. [Citations.] To the extent that these and similar holdings may be thought to create an inflexible rule requiring formal proof of earlier court records only by authenticated or certified copies of those records and proof of identity, they are incompatible with considerations of judicial economy and efficiency essential to the disposition of present-day caseloads. Nor do such procedures provide any necessary or useful safeguards to the defendants in cases such as this where the fact that the prior conviction had occurred has never been denied." *People v. Davis* (1976), 65 Ill. 2d 157, 164.

In the instant case, defendant did not deny the fact of his prior convictions or assert that he was not the same Girvies L. Davis named in the documents. Therefore, it is difficult to imagine how defendant could have suffered any prejudice as a result of the State's proof on the issue of identity. We adopt the general rule that identity of name gives rise to a rebuttable presumption of identity of person. See *People v. Cheek* (1982), 93 Ill. 2d 82, 90; 29 Am. Jur. 2d *Evidence* sec. 231 (1967).

Defendant next asserts that the State failed to prove that the prior murder convictions constituted aggravating factors which the jury could properly consider in determining whether to impose the death penalty. He urges us to construe the death penalty statute as requiring that, where murders are unrelated, they must result from premeditated acts or, in the alternative, the killings must be intentional. Specifically, he argues that there is no evidence that the Cash and Oertel murders resulted from an intent to kill

more than one person or from separate premeditated acts. The relevant portion of section 9—1 provides:

"(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

* * *

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts *so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts* ***." (Emphasis added.) Ill. Rev. Stat. 1977, ch. 38, pars. 9—1(a), (b)(3).

At first glance, the italicized portion of the statute would seem to support defendant's interpretation. However, for a number of reasons, we do not feel that the construction urged represents the legislative intent. Section 9—1(b)(3) initially states that a defendant (who attained the age of 18 at the time of the offense) may be sentenced to death if he "has been convicted of murdering two or more individuals under subsection (a) of this Section." In subsection (a), murder is defined as an intent to kill or do great

bodily harm, knowledge that the act creates a strong probability of death or great bodily harm, or death results during the commission of a forcible felony other than voluntary manslaughter. If we were to construe the italicized portion of the statute as limiting the murder convictions upon which a death sentence could be predicated, only those murders that fall under subsection (a)(1), and require an intent to kill, would qualify to support a death penalty. This would be the result since murder, as defined in part of subsection (a)(1), and in subsections (a)(2) and (3), does not require either an intent to kill or premeditation. Consequently a defendant could conceivably murder 10 people within the meaning of these subsections and yet never, according to defendant's interpretation, be eligible for the death penalty. This would be the result even though defendant *knew* his acts would result in death or great bodily harm. Despite the language of the statute, we cannot assume that the legislature intended to create such an anomaly. To so interpret the statute would substantially undercut the apparent legislative intent that two or more convictions for murder, falling within subsection (a), may support a death penalty.

Further, as the State points out, premeditation is not a recognized mental state in Illinois. The statute defining relevant states of mind in criminal offenses refers only to intent, knowledge, recklessness, negligence, and absolute liability. (Ill. Rev. Stat. 1977, ch. 38, pars. 4—4, 4—5, 4—6, 4—7, 4—9.) Consequently, there is no definition of murder which encompasses the concept of premeditation (see Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)), and the jury is never instructed thereon. For this reason, the legislature could not have intended that only unrelated murders which result from premeditated acts may support a death sentence.

We do agree with defendant that the legislative language is not meaningless. We also believe that some men-

tal state is required in order to impose the death penalty. House Bill 10, which was the bill to enact a statute for the imposition of the death penalty, originally provided that a defendant could be sentenced to death if he was convicted of murdering two or more persons, regardless of whether the deaths occurred as a result of the same act or of several related or unrelated acts. The original bill was amended by Senate amendment No. 2, which added the phrase "so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts." As amended, House Bill 10 was passed by both houses, approved by the Governor, and enacted as Public Act 80—26 (1977 Ill. Laws 71). This legislative history indicates that some meaning is to be attributed to the added phrase. The legislative intent may best be discerned by a consideration of the Senate and House debates.

After the original bill had passed both houses, a subsequent vote was taken on the adoption of the Senate amendment. Senator Knuppel, describing the amendment, stated:

> "House Bill 10 as amended provides in paragraph three, thereof, that the defendant... when the defendant has been convicted of murdering two or more individuals, this is without reference to what his intent was or how it happened. Now, you've got a possibility of three situations. You got the possibility of a man who kills two people with two separate premeditated acts, you've got the situation where a man intends to kill two people as a result of one premeditated act, or you've got the case of an individual who intends to kill one person but as a result of his act, kills two. Now, the person who intends to kill only one person and we have a recent case in Carthage or over in that vicinity where a gentleman murdered a mother, an expectant mother, and there was a seven month old child in her womb. That person actually, I'm sure, must have intended to kill only one person, or it's possible that I could aim a ...a revolver at someone that I intended to kill... planned to kill and as a result of

> that shot, killed some innocent person who walked between there. Now, the result would be that I had one... premeditated intention to kill one person, but I, in fact, killed two. Now, I think that person is entitled to some kind of... of clemency because you've got the felony provisions where if he kills someone in the act of a felony, he still may be... he still may be guilty of a crime which would be punishable by death, but if he intends only to kill one person and *accidentally kills two*, I say his crime is no more heinous than the person who tends... intends to kill one person and actually kills one person. I think this amendment would strengthen the bill because it specifically now provides, so long as the deaths were the result of either an intent to kill two... kill more than one person or of separate premeditated acts. *It would take out of this classification that person who... who intended to kill one but through inadvertence killed two.*" (Emphasis added.)

In proposing the adoption of this amendment, Representative Kosinski stated:

> "Senate Amendment #2 is somewhat dependent oriented in as much as it eliminates *accidental* death of a second person or more in a *multiple murder*. I concur with that Amendment. ****" (Emphasis added.)

See also Final Legislative Synopsis and Digest 955 (1977 Reg. Sess. 80th Gen. Assem., S. Amend. No. 2).

The emphasized portions of the above quotations indicate the bill was amended to insure that a defendant would not suffer the death penalty where a multiple murder is an accidental consequence of a single act. In other words, the physical act leading to a multiple murder must be accompanied by a culpable mental state as to *each* murder. A defendant may not receive the death penalty for related, multiple murders where more than one person was accidentally killed. Thus, the intent of the amendment was to address the problem of multiple murders committed at the same time.

In the instant case, defendant did not receive the death penalty because of his participation in a multiple-murder situation. He was convicted of three separate and unrelated murders. In the Cash murder case, he was convicted after the jury had been instructed solely on an intent-to-kill theory. In the Oertel case, the jury was instructed to find defendant guilty if he (or a person for whom he was responsible) intended to kill or do great bodily harm, or knew his act would cause death or great bodily harm. In the case at bar, the jury was instructed as to each murder theory, and it is therefore unclear upon which theory they found defendant guilty. We hold in this case that where, as here, defendant is convicted of two or more murders resulting from intentional *or* knowing acts, the death penalty may properly be imposed.

Defendant further contends that he was denied a fair sentencing hearing because the prosecutor misstated the law with respect to defendant's eligibility for the death penalty. In his remarks to the sentencing jury, the prosecutor stated that, "under the Illinois law, if you killed and are convicted of killing two or more persons, then it is a case that properly fits the death penalty where jurors should consider mitigating and aggravating circumstances as to that individual." Defendant did not object to this statement, and therefore failed to properly preserve the issue for review. (*People v. Lewis* (1981), 88 Ill. 2d 129, 149 (objections to prosecutor's argument not raised are waived).) Further, we find that the comment did not constitute error. The prosecutor was merely defining the general procedure employed in a bifurcated sentencing hearing.

Defendant alleges that he is entitled to a new sentencing hearing because he was prejudiced by evidence that a murder victim's wife delivered a baby the day after his death. This evidence was elicited through the testimony of Mr. Ostman, an attempted-murder victim, and was briefly referred to in the prosecutor's closing argument. Defend-

ant asserts that he objected to this evidence, but the basis for the objection is not disclosed in the record. The record does reveal that, after the witness stated the child's date of birth, defense counsel asked to approach the bench. A discussion was held off the record, following which the judge remarked: "I'll allow it. Go ahead." We will assume that, as the above exchange implies, a proper objection was registered.

We agree with defendant that comments and testimony regarding a deceased's family are generally improper. (*People v. Bernette* (1964), 30 Ill. 2d 359.) However, the evidence in question was not elicited during the guilt or innocence phase of the trial. Nor was it introduced during the first phase of the sentencing hearing, where the State must establish the existence of an aggravating factor in order to qualify defendant for the death penalty. The testimony was given in the second phase of the sentencing proceeding, in which the ordinary rules controlling the admissibility of evidence do not apply.

In *People v. Free* (Jan. 24, 1983), No. 52775, as in the instant case, the State introduced testimony regarding the deceased's family in the second phase of the sentencing hearing. A witness described the emotional effects of the victim's death on the family, and stated that the family moved because it was unable to enter the old house; that the husband felt "completely shut out"; that the daughters would have no mother to relate to as they were growing up; that the victim's mother was depressed and took tranquilizers; and that one of the victims who survived no longer trusted people. The court, after noting that defendant failed to object to this testimony, went on to emphasize that the evidence was introduced in the second phase of the sentencing hearing. Defendant's death sentence was upheld. We decline to depart from the reasoning adopted in *Free*.

Further, we cannot say this evidence would have influenced the jury's verdict. The jury was aware that defendant had three murder convictions (for the Biebel, Oertel and Cash murders), an attempted-murder conviction, that he was convicted of burglary, of battery, and of a gun-violation charge. In view of this significant criminal history, it is not reasonable to believe that the jury, in voting for the death penalty, was influenced by the statements in question.

In a related contention defendant argues that, pursuant to *Henry v. Wainwright* (5th Cir. 1981), 661 F.2d 56, *cert. allowed* (1982), ___ U.S. ___, 73 L. Ed. 2d 1326, 102 S. Ct. 2922, it is improper for a jury to consider nonstatutory aggravating factors. (*Henry* was remanded to the court of appeals for further consideration in light of *Engle v. Isaac* (1982), ___ U.S. ___, 71 L. Ed. 2d 783, 102 S. Ct. 1558.) We have recently determined that *Henry* is inapplicable "because our statutory procedure is different from that of Florida's death penalty law, under which the defendant in *Henry* was sentenced." *People v. Free* (Jan. 24, 1983), No. 52775, slip op. at 32.

Defendant further contends that he was denied a fair sentencing hearing by the introduction into evidence of a videotaped conversation between the defendant and State's Attorney Kuehn. Specifically, defendant argues that the tape was inadmissible because it contained evidence of a plea discussion, it violated defendant's right to silence and to be free from self-incrimination, and it violated his right to confrontation under *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. We first address defendant's contention concerning the alleged plea discussion. Supreme Court Rule 402(f) provides:

> "If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any result-

ing agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding." 73 Ill. 2d R. 402(f).

The record indicates that the discussion in question was initiated by Mr. Kuehn, the State's Attorney, for the purpose of questioning defendant about various crimes, including the Biebel, Mueller and Sepmeyer murders. Defendant was informed of his right to have his counsel present, but he stated that he did not mind talking without his attorney. After being told his constitutional rights, defendant indicated that he had no personal knowledge of the crimes, and had learned about them from other people, particularly Ricky Holman. After further questioning, the following exchange took place:

"MR. DAVIS: Hey, like, if I plead to all this, what would happen to me though? That's what I'd like to know.

• • •

MR. KUEHN: Well, if you plead to all these crimes, you would be pleading to more than one homicide, or the responsibility for it. If you were the active participant, in other words if you were the individual who actually did the shooting, you'd be subject to the capital punishment. The electric chair. However, you do have to be the active participant to receive the death penalty. In other words, you have to be the person who did the shooting.

MR. DAVIS: Okay. If I got, if I plead to all this and I got the death penalty, would they send me on, would they send me on and let me go ahead and do it?

MR. KUEHN: Well, is that what you want?

MR. DAVIS: Do I have to wait? Yeah, I [*sic*] rather have it, I would rather have it like that than wait. That's what I want, yeah, right.

MR. KUEHN: I don't understand something, Mr. Davis, I don't understand how you could detail all these things and remember all this from other people, and even if you did, why? Why would you have given all these statements implicating yourself after you knew that they could be used against you? Huh?

MR. DAVIS: I don't know.

• • •

MR. KUEHN: Why?

MR. DAVIS: Like I said, I (inaudible) I'm, you know, willing to pay for what I done. Like those guns, you know, [i]f they were going to give me the chair or something, I [would] go on with it—go on and send me on down, let me get it over with. I don't want to wait or nothing. Nos [*sic*], that I would plead to all this if that would happen, but if that don't happen then, no, I'm not going to plead to it. And that's just it. Now, if that could be arranged in some kind of way, everything would be all right.

MR. KUEHN: Well, I don't understand. I don't understand you're saying in one sentence that you just heard this about other people, from other people, that you didn't really participate in any of these crimes that you've given statements on. And then in the next, you say, but if you can arrange it that I can get the death penalty quickly, I'll plead to it. If you didn't do them, why would you want to plead to it?

MR. DAVIS: To get out.

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MR. DAVIS: Yeah, [I was at one home invasion.] But there was nobody killed in the home I was at. See, like I said, like I said if things can be arranged like I said everything will be all right. But I don't want to be sitting, I don't want to be waiting. I just want to go ahead and get it over with.

MR. KUEHN: Let me tell you something, Mr. Davis. I'll do everything I can to arrange that for you. To see that you are executed promptly and efficiently, but I only want to do that if you're a murderer. Are you a murderer?

MR. DAVIS: Yeah, I'm a murderer.

MR. KUEHN: Is that the truth?

MR. DAVIS: Yeah, that's the truth.

MR. KUEHN: Well, now convince me that that's the truth. Tell me about each one of these like you told the police. I don't want to send an innocent man to his death. Do you understand?

MR. DAVIS: Yes, sir. If I can get some papers that I can sign saying that I will be destroyed after I get through talking, I'll talk, I'll give you, I'll tell you everything. I mean everything. I mean everything."

Defendant subsequently indicated that he wanted the State to destroy him, and Mr. Kuehn responded that, as State's Attorney, it was his duty to prosecute cases. He then stated:

"MR. KUEHN: Probably from being in the jail, you realize I've convicted Mr. Jones, Mr. Tiller and Mr. Bush. They're all looking at the death penalty. Eugene Walker has already received that sentence out of this jurisdiction. I'm telling you, as the State's Attorney, that if you are a murderer, if you can convince me that you're telling the truth that you are involved in all of these crimes, I give you my personal guarantee, Mr. Davis, that I'll do everything I can to see you down at Menard and in the electric chair and destroyed as soon as possible, but I'm not going to give you any favors on that guarantee until I hear you explain to me why I should seek that death penalty. Why you are a murderer.

MR. DAVIS: Okay, like, okay, then. (Inaudible) After I give you all the information about how long would it take?

MR. KUEHN: A few months.

MR. DAVIS: That's like suffering. Knowing you're going to do it, knowing you'll get it, you know, waiting, cause, that's the hang of waiting. I don't want to wait for nothing. And I ain't waiting. I wasn't waiting when I was doing that stuff out there on the street. Why should I wait now?"

Defendant later stated that he had not told the truth up to this point. He asked if it would take a couple of months before he could be executed, to which Mr. Kuehn responded:

"MR. KUEHN: I can't make you any promises, you understand? I can't make you any promises. I don't want you to give me any statement as a result of some promise even if it's a unique promise that I'll try to see you receive the death penalty. That's an odd request of a man.

> But I can't give you any promises. Do you want to tell me or explain something to me? Do you want to explain about these statements? Why would you tell the police that you were at all these places? Do you want to tell me that, or do you want to tell—go through the details and convince me of the fact that you were telling them the truth? Do you want to talk to me at all? I want to do whatever you want to do right now."

Defendant immediately indicated that he did not wish to talk anymore. Mr. Kuehn then asked why he would make the statements and defendant stated that he was "tired of living." Subsequently, however, he claimed that his previous statements accurately reflected what had happened.

It is certainly questionable whether the quoted exchange can be fairly characterized as a plea discussion. The prosecutor obviously lacks authority to guarantee defendant a prompt execution. However, even assuming the conversation was plea related, we do not believe that evidence of this discussion constituted error at this stage of the proceedings.

In *People v. Hill* (1980), 78 Ill. 2d 465, 472, this court determined that the purpose underlying Rule 402(f) is to insure "that plea discussions may be conducted in an atmosphere of candor, free of the risk that statements made during negotiations will be used *as evidence of guilt.*" (Emphasis added.) Evidence of plea discussions could have a " 'devastating' effect" upon the jury (78 Ill. 2d 465, 474), because it may well infer defendant's guilt from the fact that he pleaded, or attempted to plead, guilty. However, in the instant case, the plea discussion was not used as evidence of guilt. Defendant's guilt had already been established, in the guilt phase of his trial, and therefore the purpose for the rule is no longer applicable. (See *People v. Greer* (1980), 79 Ill. 2d 103, 118-19 (evidence of plea discussion is proper where commission of alleged act is not disputed).)

Further, the tape was not introduced in the first stage of the sentencing hearing, during which the State must prove an aggravating factor upon which the death penalty could be imposed. There, we would agree that defendant's guilt of a necessary aggravating factor should not be determined by the fact that he admitted guilt thereto in the course of plea discussions. Here, however, the tape was introduced into evidence during the second phase of the sentencing hearing, when defendant's eligibility for the death penalty had already been determined.

Section 9—1(e) (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(e)), allows for the introduction of evidence during the second phase of the sentencing hearing which would not be admissible during the guilt phase of trial. In ruling on the admissibility of evidence, the judge may conduct a broad inquiry " '**** largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " (*People v. La Pointe* (1981), 88 Ill. 2d 482, 496, quoting *Roberts v. United States* (1980), 445 U.S. 552, 556, 63 L. Ed. 2d 622, 628, 100 S. Ct. 1358, 1362; *Williams v. New York* (1949), 337 U.S. 241, 247, 93 L. Ed. 1337, 1342, 69 S. Ct. 1079, 1083.) The factors controlling admissibility are the relevance and reliability of the proffered evidence. This determination lies within the discretion of the trial judge. See *People v. Free* (Jan. 24, 1983), No. 52775.

It is further contended that the videotape was inadmissible as evidence because it violated defendant's right to silence and to be free from self-incrimination. Specifically, defendant asserts that he was subjected to further questioning after invoking his right to remain silent. There is no question that if an "individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the per-

son invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda v. Arizona* (1966), 384 U.S. 436, 473-74, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1627-28; see, *e.g.*, *Michigan v. Mosley* (1975), 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321.

At the beginning of the taped discussion, defendant was informed of his constitutional rights, including the right to have counsel present during the questioning and the right to remain silent. He stated that he did not mind talking without his lawyer present and indicated a willingness to discuss his prior statements. As noted previously, after the prosecutor informed defendant that he could not make any promises regarding the request for a prompt execution, defendant stated that he did not wish to talk anymore. The prosecutor then asked defendant if he realized that evidence was being developed based on the prior written statements and if he would like to explain his defense. Defendant indicated that he made the statements because he was "tired of living," and that he was not threatened or promised anything by anyone to make those statements. Subsequently, the following exchange took place:

> "MR. KUEHN: I'm at this point trying to understand, but you indicated that you don't really want to talk anymore. Is that your wish?
>
> MR. DAVIS: (Inaudible).
>
> MR. KUEHN: I'm not going to talk to you anymore.
>
> MR. DAVIS: Like I gave them statements? That's the way it happened. Just the way I gave my statements."

Sergeant Lay, who was present at the questioning, asked defendant to tell the truth, and Mr. Kuehn stated that he was willing to listen, "but everytime we get down to talking about it, I don't know whether you really want to talk about it." After further brief questioning, defendant again stated that he did not wish to talk anymore. Mr. Kuehn replied that he would have defendant returned to jail and would not continue the conversation. However, as

defendant was preparing to leave, the prosecutor asked if defendant would mind being asked one more question. Defendant responded: "Go ahead." In reply to several further inquiries, defendant stated that he knew Lawrence and Harris, that they were his cellmates, that he knew they were convicted for a crime in which defendant implicated himself, and that he was not threatened to confess to that crime. Mr. Kuehn then asked: "Well, then why did you confess to that? Did you do that one?" Defendant replied: "Like you say, I'll get back with you in the next day or two." The conversation was then terminated.

We agree with defendant that his right to remain silent was not scrupulously honored. He was subjected to questioning after he indicated a desire to cease the discussion. It has recently been held that, even in the sentencing hearing, a defendant's fundamental constitutional rights cannot be abrogated. (*People v. Szabo* (Jan. 24, 1983), No. 52626.) Nevertheless, after a careful review of the conversation in question, we find that it was not reversible error. As noted previously, the jury, during the guilt phase of the trial, was already familiar with the statements defendant made regarding the murders, as they were read in full by the prosecutor. During the taped discussion, there were only vague references to additional crimes, except one offense for which Lawrence and Harris were convicted. The jury was previously aware, during the guilt phase of defendant's trial, of this incident because it was argued by defense counsel, in an effort to indicate that defendant confessed to crimes in which he was not involved. Although defendant did state that he took part in burglaries during which no one was killed, the jury heard testimony establishing that he was convicted for burglary. With respect to defendant's statement that he was "tired of living," we cannot assume, as defendant urges, that this would influence the jury's decision as to whether or not to impose the death penalty. In fact, defense counsel referred to defendant's desire to die

as a mitigating circumstance, asserting that it indicated he was emotionally disturbed. Finally, although defendant did admit during the discussion that the statements he gave the police were true, he did so immediately after the prosecutor agreed not to talk with him anymore.

While defendant does not cite *Estelle v. Smith* (1981), 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866, with reference to this contention, we feel that it should be distinguished from the circumstances in the instant case. In *Estelle*, the Supreme Court vacated a death sentence because defendant's fifth amendment rights were violated during the sentencing hearing. At that time, a doctor who had conducted a pretrial psychiatric examination of the defendant testified that, from his conversation with defendant, he concluded that defendant was a severe sociopath and would commit further criminal acts if given an opportunity to do so. Under the applicable Texas law, an issue for the jury to determine in deciding the propriety of the death sentence is the probability that defendant would commit future criminal acts of violence. The court held that defendant's fifth amendment rights were violated because, prior to the psychiatric examination, he was not informed of his right to remain silent and that the statements could be used against him. The evidence was apparently not presented to the jury during the guilt phase of defendant's trial. Thus, the possibility that this "new" evidence could prejudice the defendant is clear. It was directly relevant to an aggravating factor necessary for the imposition of the death penalty.

In contrast, the defendant here was fully apprised of his constitutional rights. That he was aware he could refuse to answer certain questions is clear because he did so twice during the conversation. Further, no new evidence was elicited which we believe was of a prejudicially incriminating nature for purposes of sentencing. See *People v. Black* (1972), 52 Ill. 2d 544, 556, *cert. denied* (1973), 441

U.S. 967, 36 L. Ed. 2d 689, 93 S. Ct. 2155 (fourth amendment violation deemed harmless where tainted evidence could have no "impact of consequence upon the jury when viewed against the other evidence").

Defendant further asserts that the videotape was improperly admitted into evidence because it violated his right to confrontation. At one point during defendant's taped discussion with Mr. Kuehn, the prosecutor informed him that Holman stated that defendant "did the shooting." Because defendant could not confront Holman on this issue, he alleges that the rule established in *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620, was violated.

In *Bruton*, defendants Evans and Bruton were jointly tried on a Federal charge of armed postal robbery. A witness testified that Evans confessed that he and defendant committed the robbery. Because Evans did not testify, he was not subject to cross-examination by Bruton. In reversing Bruton's conviction, the court held that a codefendant's confession, implicating the defendant, is not admissible in evidence where the codefendant does not take the stand and is not subject to cross-examination.

This situation is not analogous to the instant case. Here, defendant and Holman were not codefendants in a joint trial, and the evidence was not used at trial to prove defendant's guilt. (See *People v. Wright* (1974), 56 Ill. 2d 523, 533 (*Bruton* is inapposite where the statement was not made by a codefendant in a joint trial).) Further, we are unaware of any reason why Holman would have been unavailable to testify. Defendant could have called him to the stand for purposes of cross-examination if he so desired.

It should again be noted that the video tape was introduced into evidence during the second phase of the sentencing hearing. At that time, the only issue to be determined was whether there were mitigating circumstances

sufficient to preclude imposition of the death penalty. The defense presented no testimony relevant to mitigating factors except that provided by defendant's wife. The only real point of her testimony was to indicate that, if defendant were sentenced to prison instead of death, she would visit him. Under these circumstances, we cannot say that the jury would have improperly considered the video tape so as to outweigh otherwise significant mitigating factors.

During the prosecutor's closing argument to the sentencing jury, he stated: "[W]hether or not this defendant actually receives the death penalty, won't be in your hands. This decision of whether you're going to recommend he receive it is." Defendant alleges that this remark is either an improper reference to appellate review or a misstatement of the law, either of which denied him a fair sentencing hearing.

Defendant did not object to this statement. Failure to object to the admission of evidence, even in the context of a death case, generally precludes review of the issue on appeal. (See *People v. Lewis* (1981), 88 Ill. 2d 129, 149; *People v. Carlson* (1980), 79 Ill. 2d 564, 575-78.) In addition, the jury was clearly instructed that its decision was binding upon the judge. Defense counsel, during closing argument, also emphasized the fact that any decision the jury made would be final.

Defendant further contends that he was denied due process at the sentencing hearing when the court refused to give an instruction listing nonstatutory mitigating factors for the jury to consider. Specifically, defendant requested that the jury be instructed as follows:

> "Mitigating factors include, but are not limited to, the following circumstances:
>
> 1. The defendant was not personally present during the commission of the act or acts causing death;
>
> 2. The murdered individuals were not actually killed by the defendant;

3. The defendant's criminal conduct was induced or facilitated by someone other than the defendant.

If, from your consideration of the evidence, you find that any of the above mitigating factors are present in this case, or that any other mitigating factors are present in this case, then you should consider such factors in determining whether to recommend the imposition of the death sentence."

The instruction was refused on the grounds that these factors were not specifically listed as mitigating circumstances in the statute. We believe the trial judge's reason for refusing the instruction was improper. As the Supreme Court stated in *Lockett v. Ohio* (1978), 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990, 98 S. Ct. 2954, 2964-65:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Here, however, factor No. 1 of the instruction was actually given to the jury. With regard to factor No. 2, we find that this instruction was overly broad. The evidence indicated that defendant did actually kill one of the murder victims. With regard to factor No. 3, there is no evidence in the record to support it.

Further, the *Lockett* court held only that a defendant cannot be precluded from introducing into evidence any relevant mitigating factors. Because the Ohio statute in question only allowed consideration of specific mitigating circumstances, the court held that it was unconstitutional. In the case before us, the trial judge clearly indicated that the jury was not limited to a consideration of the statutory mitigating circumstances. He instructed the jury, in part, as follows:

"In your deliberations in this stage of the hearing, you shall consider any aggravating and *any mitigating factors which are relevant to the imposition of the death penalty.*

Mitigating factors are those facts or circumstances which provide reasons for imposing a sentence less than the death penalty. Mitigating factors *may* include:

1. The defendant has no significant history of prior criminality;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. The murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. The defendant was not personally present during commission of the act or acts causing death;

6. *Any other facts or circumstances that provide reasons for imposing less than the death penalty.*" (Emphasis added.)

We have held that where the instruction requires the jury to consider all mitigating factors, the dictates of *Lockett v. Ohio* (1978), 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954, are satisfied. *People v. Free* (Jan. 24, 1983), No. 52775, slip op. at 27.

Defendant's next allegation of error concerns a trial court ruling that allowed the State to present both closing and rebuttal arguments during the sentencing hearing. He urges that this was error since the prosecution, during the second stage of the sentencing hearing, no longer had any burden of proof. This issue was recently resolved adversely to the defendant in *People v. Kubat* (Jan. 24, 1983), No. 53726, slip op. at 33-34.

While this case has been under advisement, the United States Supreme Court filed an opinion in *Enmund v. Flor-*

ida (1982), ___ U.S. _____, 73 L. Ed. 2d 1140, 102 S. Ct. 3368. Defendant contends that the *Enmund* decision precludes imposition of the death penalty in the instant case. We disagree.

In *Enmund*, two people were shot to death by Enmund's codefendants during the course of a robbery. Enmund's participation in the offense was that he drove the getaway car. He was not present at the scene of the crime. On the basis of this limited involvement, he was convicted of first-degree murder and sentenced to death under the felony-murder portion of the Florida statute. In reversing the death penalty, a majority of the Supreme Court held:

> "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not." (___ U.S. _____, _____, 73 L. Ed. 2d 1140, 1151, 102 S. Ct. 3368, 3376-77.)

The court went on to state that the sentence had to be reversed "[b]ecause the Florida Supreme Court affirmed the death penalty *** in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or *contemplated* that life would be taken ***." (Emphasis added.) ___ U.S. _____, _____, 73 L. Ed. 2d 1140, 1154, 102 S. Ct. 3368, 3379.

We find the circumstances in the instant case clearly distinguishable from those in *Enmund*. In this case, the defendant did not receive the death penalty for his participation in a felony, during the course of which a murder spontaneously occurred. The aggravating factor upon which the death penalty was sought was that defendant had been convicted of murdering two or more people. As previously noted, in the Cash case, defendant was clearly

convicted on an intent-to-kill theory, as that was the only murder theory upon which the jury was instructed. A different jury found defendant guilty of the Oertel murder on the grounds that he (or a person for whom he was responsible) either intended to kill or do great bodily harm, or knew his act would cause death or great bodily harm. In the instant case, the jury was instructed as to all theories of murder. It is therefore unclear upon which theory they found defendant guilty.

However, even if the jury returned a guilty verdict based on felony murder, and although the evidence indicates that defendant was not the "triggerman," *Enmund* is inapplicable. In the instant case, by defendant's own admission, he was present during the course of the burglary. Indeed, defendant stated that while his codefendant shot the victim, he was carrying stolen items out to his car. Further, defendant certainly had reason to contemplate that a life would be taken, or that lethal force would be employed. As previously noted, defendant confessed to participating in the Mueller murder. This killing occurred before the murder which is the subject of the instant case. Defendant stated that the victim was shot by Holman while defendant was carrying stolen property to his car. In view of the similarity in circumstances, the conclusion is inescapable that defendant must have anticipated the killing of the victim in the instant case.

As the Supreme Court intimated in *Enmund*, the death penalty may be imposed on a defendant who does not himself kill "if the likelihood of a killing in the course of a [felony] were so substantial that one should share the blame for the killing if he somehow participated in the felony." (___ U.S. _____, _____, 73 L. Ed. 2d 1140, 1153, 102 S. Ct. 3368, 3378.) This is just such a case, and we hold that *Enmund* does not preclude imposition of the death penalty.

Also distinguishable from the instant case is this court's recent opinion in *People v. Tiller* (Dec. 17, 1982), No.

53260. There defendant's death sentence was reversed in light of *Enmund*. However, in *Tiller*, the evidence indicated that defendant was not present when his codefendant murdered one of the two victims. Here defendant was present and it is clear that he must have contemplated that lethal force would be employed by Richard Holman. Finally, the defendant in *Tiller* was convicted of two related murders. The deaths occurred at virtually the same time, in the same place, and arose out of the same incident. In our case, the defendant was convicted of three separate murders. The Cash conviction resulted from an intent to kill, and there the evidence indicated defendant was the "triggerman."

In defendant's *pro se* brief, he raises two additional contentions regarding the sentencing proceeding. He argues that his rights were "totally violated by the Court and State," and that the video tapes introduced during the sentencing hearing were altered by the State. We find no evidence in support of this allegation, and defendant points to none.

He also contends that his eighth amendment rights were violated because he received a death sentence instead of a prison term. He states that the prosecutor offered him a plea bargain in which he would receive 80 years' imprisonment "for all the [crimes] they had Defendant [charged] with." Again, the record discloses no evidence in support of this allegation.

For the reasons stated, the judgment of the circuit court of St. Clair County is affirmed. The clerk of this court is directed to enter an order fixing Tuesday, May 24, 1983, as the date on which the sentence of death entered in the circuit court shall be executed. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and the wardens of the Illinois State Penitentiary at Menard and Joliet.

Judgment affirmed.

JUSTICE SIMON, dissenting:

Although I have no intention of disputing the prosecutor's observation that the defendant, Gervies L. Davis, is no altar boy, he was still entitled to a fair trial and to the protections the law gives to every person charged with crime. Both the guilt and the sentencing hearings were deficient in these respects. Because of the series of errors outlined below I believe the defendant's conviction should be reversed and this cause remanded for a new trial.

THE VERDICT OF GUILT

I

I find no justification for the court's refusal to dismiss juror Lewis after he informed the trial judge of his close friendship with a relative of a person murdered in a robbery in which the defendant might have been involved. As the majority opinion points out, the juror knew that his close friend was bitter about the incident and because of his friendship with the victim's relative, juror Lewis stated he did not know whether he could keep an open mind. He recognized that he had a conflict of interest and that it was his duty to make the court aware of it. The only thing Mr. Lewis said which could possibly support the majority's conclusion that leaving him on the jury was not improper was his statement, "I think for this case, since it is a separate case, I think I could look at this case ***." This was at best an ambiguous response to the problem which confronted Mr. Lewis. It did not justify the conclusion that he could be impartial, especially because the statement quoted above was preceded by his remark, "I don't think I could ever put it totally out of my mind because it was someone near to me ***." I am disturbed, as juror Lewis himself apparently was, over whether he could be objective, knowing that if he voted for acquittal his close friend might be displeased. In my judgment, the trial judge did not properly take into account the concern that juror Lewis might have about facing his close friend if he found it necessary

to vote to acquit the defendant, a prospect which might have prevented Mr. Lewis from viewing the evidence impartially.

The majority relies on the trial judge being in a superior position to observe the juror's demeanor and decide what his attitude really was. But I cannot understand how observing the juror's demeanor would assist the trial judge in knowing how Mr. Lewis would resolve the conflict of interest arising from his friendship with the victim's relative. The fact that a conflict of interest existed should have been sufficient to disqualify Mr. Lewis. *People v. Stoval* (1968), 40 Ill. 2d 109.

A remark made by the trial judge, who had previously presided over an unrelated murder trial of the defendant's accomplice, is relevant to this issue. After the jury in this case had returned the verdict imposing the death penalty, the trial judge stated, "*** Mr. Davis [the defendant] is a no-good, cold-blooded killer that doesn't deserve to live." It is not clear from the record at what point the trial judge formed this impression of the defendant; it is entirely possible that he might have formed that opinion, at least in part, early in the trial before juror Lewis mentioned his concern about continuing to sit in the case. If that is so, the trial judge's own observation of juror Lewis' demeanor in deciding whether to retain him on the jury is suspect.

With two alternate jurors having been selected, I see no reason why in the interest of fairness and having a jury which was not only impartial but also had the appearance of impartiality, the trial judge should not have acquiesced in the replacement of Mr. Lewis by one of the alternates. It appears to me that juror Lewis was more sensitive to the conflict of interest that his friendship with the victim's relative created for him than was either the circuit judge or this court, and that permitting Mr. Lewis to remain on the jury was an abuse of discretion.

II

A second reason for granting a new trial is the prosecutor's highly improper reference to the other murders in which the State claimed the defendant was involved. Evidence of the Mueller and Sepmeyer murders was admitted for the purpose of showing knowledge and *modus operandi*—preying upon elderly persons by invading their homes when they were alone, stealing their property and shooting them. I find no fault with admitting this evidence for this limited purpose. But that is not the way the prosecutor used the other two murders in his final argument. He told the jury that the State and police officers wanted the defendant convicted because he and his accomplice were out killing and they killed three "defenseless old, decrepit, aged people." The defendant was charged in this case with only one murder, that of 89-year-old Charles Biebel. He was not on trial for the Mueller and Sepmeyer murders. It was improper to urge the jury to convict the defendant because he also murdered Mueller and Sepmeyer, and the defendant's objection to the final argument should have been upheld.

Unlike the majority, I am not comforted by the trial judge's instruction to the jury that the Mueller and Sepmeyer murders were to be considered only for the limited purpose of showing defendant's design and knowledge. This advice was not given in a single, direct instruction but rather in two separate instructions, one of which simply stated the general rule that any argument made by the attorneys not based on the evidence should be disregarded. There is no realistic way of knowing whether the instruction it received impressed the jury as much as the prosecutor's colorful and highly prejudicial argument, designed to remind the jury that the defendant was involved in three killings in addition to the two for which he already stood convicted.

III

I also disagree with the way the majority disposes of the defendant's objection that the prosecutor used peremptory challenges to obtain an all-white jury. After concluding, as the majority did, that the record fails to show any pattern of exclusion of prospective jurors on the basis of race, I fail to understand the need for the majority to refer to *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, for the proposition that the prosecutor has a right to exclude prospective jurors in exercising peremptory challenges for any reason, including their race.

In the first place, I am not certain that *Swain* so holds, even as a matter of due process. Although, as pointed out by the appellate court in *People v. Payne* (1982), 106 Ill. App. 3d 1034, 1041, the Supreme Court in *Swain* stated that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control" (380 U.S. 202, 220, 13 L. Ed. 2d 759, 772, 85 S. Ct. 824, 836), the court observed later in the opinion that the peremptory challenge is not designed to facilitate or justify a system which results in denying black persons "the same right and opportunity to participate in the administration of justice enjoyed by the white population." (380 U.S. 202, 224, 13 L. Ed. 2d 759, 774, 85 S. Ct. 824, 838.) Thus, I construe *Swain* as recognizing that peremptory challenges are not totally outside the control of the trial court.

Second, I believe that the strength of the *Swain* holding has been diminished by later decisions under the sixth amendment in *Duncan v. Louisiana* (1968), 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444, and *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692. These decisions recognized "the fair-cross-section requirement as fundamental" to the sixth amendment right of a defendant to a jury trial in a State criminal prosecution. The rights of an accused in a State trial to the strictures of

the sixth amendment in the selection of a jury and their impact on exclusion of persons from a jury by peremptory challenge only on the basis of race, sex or religion were not decided in *Swain*. In fact they were not even raised, because *Swain* was not decided before the sixth amendment was held to be applicable to State criminal trials. (*People v. Payne* (1982), 106 Ill. App. 3d 1034, 1042.) The *Swain* holding dealt only with whether peremptory challenges aimed at producing an all-white jury comported with due process of law under the fifth and fourteenth amendments, and is not authority for a holding that such challenges do not violate the sixth amendment, particularly in light of *Taylor* and *Duncan*.

For these reasons I believe that deciding to what extent the trial court is responsible for controlling the use of peremptory challenges by a prosecutor to exclude persons from a jury on the basis of their race, sex or religion is a mistake in this case, and should be deferred until a case reaches this court with a record which shows more clearly than the one now before us that a number of prospective jurors were excluded on the basis of race with the purpose of obtaining an all-white jury. Until such a factual situation is presented to this court, I believe that resolution of the issue merely in reliance on *Swain v. Alabama* is obsolete and too simplistic to provide helpful guidance for trial courts. The issue has come to the attention of our appellate court on numerous occasions in the past three years and also during the 1970 to 1980 decade, although on less frequent occasions. I believe that to give proper guidance to our trial courts we should deal with the constitutional issue more fully than the court has been able to on the basis of the facts presented, briefs filed and arguments advanced in this case.

THE DEATH SENTENCE

In my judgment, the defendant is also entitled to a new sentencing hearing.

I

I believe that it was error to allow evidence that the wife of Frank Cash, one of defendant's victims, gave birth to a baby the day after he was murdered. My reasons for arriving at this conclusion are fully stated in my dissent in *People v. Free* (Jan. 24, 1983), No. 52775 (Simon, J., dissenting). The only purpose this evidence could serve was as an emotional appeal to the jury. The majority relies on *Free*, where the admission of similar testimony was not held to be a ground for reversal. However, in that case, as the majority acknowledges, the defendant failed to object to the improper testimony and the court emphasized in *Free* that the defendant had waived the right to have the propriety of the evidence considered on appeal. In this case the majority concedes that the record implies that a timely objection was presented.

While it is true, as the majority points out, that this evidence came in during the second phase of the sentencing procedure, I am not aware that the law is that anything goes at this stage of the trial and and that the doors are thrown open to any type of evidence the State desires to put in. The majority agrees "that comments and testimony regarding a deceased's family are generally improper." (Slip op. at 22.) I do not understand how they can be regarded as relevant or as serving any purpose other than to arouse the passions of the jury even when offered during the phase of the sentencing proceeding in which the court is receiving evidence in mitigation.

The majority's willingness on the basis of *Free* to accept irrelevant and improper evidence is inconsistent with this court's reasoning and decision in *People v. Szabo* (Jan. 24, 1983), No. 52626. In the latter case we held that there were limits on the types of evidence that were acceptable in the second phase of the sentencing. Thus, for example, a prosecutor's closing remarks "calculated to play upon the

jurors' emotions" and which we characterized as "clearly improper," "inflammatory and prejudicial" were held to be grounds for vacating the sentence of death in *Szabo*. (Slip op. at 24-25.) The limitations placed by *Szabo* upon the type of evidence which may be offered at the sentencing hearing do not correspond with what the majority of this court had to say on the same subject in *Free* and is saying in this case; it is my respectful suggestion that there exists a dichotomy between these opinions calling for reconciliation by this court.

The majority appears to be saying that reference to the birth of a child the day following the murder of its father was harmless in view of the three murder convictions, an attempted-murder conviction and convictions of burglary and battery which the jury was aware comprised the defendant's "significant criminal history." This is a bootstrap argument. If in view of the defendant's criminal history it is not reasonable to believe that the jury could have been influenced by hearing about the birth of the Cash baby, why bother to hold any hearing in mitigation? Perhaps the logical procedure would be merely to label the defendant a no-good, cold-blooded killer who doesn't deserve to live, as the trial judge ultimately did, and dispense entirely with the hearing in mitigation. Yet the mitigation hearing is required by the Constitution (see *Lockett v. Ohio* (1978), 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990, 98 S. Ct. 2954, 2965) and the death penalty statute itself (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(c)). I fail to see why a hearing which is provided as an opportunity for the defendant to escape execution should be turned into a forum for the introduction of evidence by the State that is prejudicial to the defendant and is interdicted at other stages of the trial because it is irrelevant to any issue in the case.

II

Next, the prosecutor's suggestion to the jury in closing argument at the sentencing hearing that its decision would be a recommendation that the defendant receive the death sentence, but that whether he would actually be put to death would not be in their hands, denied the defendant a fair hearing. The majority disposes of this impropriety by first arguing that because no objection was raised by the defendant, the error was waived. But, as I pointed out in dissenting in *Free*, "few propositions have a longer pedigree in the common law of this State than that any irregularity not *expressly* waived in the trial of a capital case" must be examined if raised on review. (*People v. Free* (Jan. 24, 1983), No. 52775, slip op. at 39 (Simon, J., dissenting).) This old rule has recently been buttressed by this court's decision in *People v. Brownell* (1980), 79 Ill. 2d 508, where the defendant received a new sentencing hearing on an issue which was neither raised in the trial court nor on appeal, and by *Eddings v. Oklahoma* (1982), 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869, where the Supreme Court granted a new sentencing hearing on a ground that was not expressly presented in the defendant's petition for *certiorari*. Whether the instruction the jury was given that a verdict by the jury that the defendant receive the death sentence would require the court to impose that sentence was given more attention by the jury than the prosecutor's misleading remarks is impossible to determine. It is significant, however, that in spite of defendant's long criminal history, which the State has emphasized before this court, which disclosed the defendant might have been involved in the murder of five persons, and of which the jury was aware, the sentencing jury deliberated for more than eight hours before deciding the defendant should receive the death penalty. In *Szabo* we held that it was improper for a prosecutor, in arguing for a death sentence, to suggest to a

jury that if the death sentence were not imposed the defendant might be released on parole. I believe it is an error of at least equal magnitude to mislead a jury by suggesting to it that its decision would be only advisory, and whether the defendant would actually be put to death was a matter someone else would ultimately decide. This error alone warrants a new sentencing hearing.

III

I believe the introduction of the videotape recordings in which the defendant expressed the desire to be put to death quickly was another error. The sentencing jury witnessed and heard out of the defendant's own mouth that he desired to be executed promptly. This was after the jury had already found the defendant guilty, so one can only wonder what purpose introduction of the videotapes served other than to let the jury know that at one time the defendant said he wanted to die and get it over with.

The defendant argues that his dialogue with the State's Attorney of St. Clair County actually constituted a plea bargain, a request by the defendant that he be guaranteed quick execution. As I read the transcript of the tapes I would characterize the conversation as a plea bargain, although I concede it was a strange and unusual one. Contrary to the majority, I see no reason why a plea bargain would be less harmful if admitted during the second phase of the sentencing hearing than earlier in the case. Our rules (87 Ill. 2d R. 402(f)) make no such distinction; they prohibit the use of a plea discussion "in any criminal proceeding," and the second phase of the sentencing hearing is clearly a part of a criminal proceeding.

Another reason the videotapes should not have been admitted even at this stage of the proceedings is that they included the statement by the prosecutor that the defendant's accomplice, Ricky Holman, had implicated the defendant in several incidents in which Holman claimed the

defendant did the shooting. This was the first time that the jury heard that the defendant had himself shot any of the victims. This hearsay evidence of Holman's charges was obviously prejudicial to the defendant before a jury determining whether he should live or die. The tapes were relevant only to the issue of whether the defendant was the triggerman. It should have been introduced, if at all, at the first, or aggravating, stage of the sentencing hearing. The State's failure to introduce it then does not entitle it to do so in the mitigation phase of the hearing, by which time all of the State's evidence in aggravation should be known to the defendant and the jury.

The videotapes were irrelevant to the gravity of the defendant's conduct and shed no light on his rehabilitative potential, and under the standards set forth in *People v. Szabo* (Jan. 24, 1983), No. 52626, they should not have been admitted into evidence. The fact that at one time the defendant told the State's Attorney he wanted to die did not make him more deserving of the death penalty, and even if it did, the videotapes may have been confusing to the jury because at the time of his sentencing the defendant wanted to continue to live.

IV

Two additional reasons, even more fundamental, require the conclusion that the death sentence is impermissible in this case. First, the majority's decision that the State has carried its burden of proving that defendant's multiple convictions for murdering Charles Biebel, John Oertel and Frank Cash constitute an aggravating factor under the death penalty statute is not supported by the record. The statute reads in relevant part:

> "(b) Aggravating Factors. A defendant who at the time of the commission of the offense *** who has been found guilty of murder may be sentenced to death if:
>
> * * *

> 3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts *so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts* ***." (Emphasis added.) Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3).

Clearly the legislature did not intend for capital punishment to be imposed upon any defendant convicted of two or more murders, even when those convictions were based on subsection (a)(1) of the murder statute (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)(1)). The italicized phrase requires the State to prove at a minimum that the defendant either *intended to kill* at least two people or engaged in two distinct, *premeditated* murderous acts. The record shows only that the Cash murder was intentional. In the case of the Oertel conviction, the jury was instructed that it could convict the defendant of murder if it found that defendant acted with intent to kill, with intent to do great bodily harm, or with knowledge that death or great bodily harm would result. He was convicted of the Biebel murder after the jury was instructed on felony murder and knowledge that death or bodily harm would result, and after a statement was made by the prosecutor in closing argument that intent to kill is irrelevant in cases of felony murder. Nothing in the jury's verdict in either the Oertel or Biebel cases or in the record indicates which theory of murder it adopted. See *People v. Harris* (1978), 72 Ill. 2d 16.

Defendant's convictions of the Cash, Oertel and Biebel murders could serve as the basis for imposing the death penalty only if the State had been able to demonstrate unambiguously that at least two of them resulted from an actual intent to kill or from distinct premeditated acts. Ag-

gravating factors relied on to support a death sentence must be proved beyond a reasonable doubt. (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(f); see *People v. Brownell* (1980), 79 Ill. 2d 508, 534.) The evidence in this case shows at most that the defendant might have intended to kill John Oertel and Charles Biebel; the record falls short of showing that the jury actually found that such an intent existed.

Finally, because of *Enmund v. Florida* (1982), ___ U.S. ___, 73 L.Ed. 2d 1140, 102 S. Ct. 3368, the defendant would not be eligible for the death penalty for the murder of Charles Biebel if the verdict in this case were based on felony murder, a possibility which the evidence and the jury verdict clearly leave open. The majority opinion acknowledges that the evidence indicates that the defendant was not the triggerman in the Biebel murder and that he was engaged in taking stolen items out of the Biebel house to his car when the murder was actually committed. It observes, however, that the *Enmund* decision permits capital punishment where a defendant convicted of felony murder "contemplated" that life would be taken (___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1154, 102 S. Ct. 3368, 3379), and proceeds that on the theory that the defendant must have so contemplated in this case because the Mueller murder had occurred earlier, under similar circumstances. That is too artful a use of the word "contemplate" in deciding whether a defendant is excluded from the protection of *Enmund*, and is a departure from the *Enmund* holding that the eighth amendment forbids imposition of the death penalty on one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." ___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1151, 102 S. Ct. 3368, 3376-77.

Neither a burglary nor the act of carrying stolen items out of a house that is being burglarized is in itself a mur-

derous act. Such conduct by itself does not intimate an intent to kill. That a murder occurred while defendant was carrying items out of a house on a previous occasion may be enough to convey notice to defendant that his accomplice has murderous tendencies, so that a second murder might be said to be *foreseeable* should defendant engage in similar conduct in a subsequent burglary. He would then be liable for the tort of wrongful death as well as for the crime of felony murder. But foreseeability is not the same as intent, active contemplation, or actual anticipation. To equate the concepts, as the majority does, is to read into negligent or reckless conduct a volitional element that does not exist. Basing an execution on so expansive a definition of the word "contemplate" not only does violence to the clear holding of *Enmund* that a person convicted of felony murder cannot constitutionally be put to death absent a showing that he intended that life be taken, but ignores the fact that our criminal code specifically distinguishes "intent" (Ill. Rev. Stat. 1979, ch. 38, par. 4—4) from "knowledge" (Ill. Rev. Stat. 1979, ch. 38, par. 4—5), "recklessness" (Ill. Rev. Stat. 1979, ch. 38, par. 4—6), "negligence" (Ill. Rev. Stat. 1979, ch. 38, par. 4—7), and other states of mind and requires, in order to impose a death sentence, that a defendant convicted of felony murder intend to kill or at least know that as a consequence of his actions a death is likely to occur (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(6)(b)). I conclude that it is error for the trial court or this court to treat bare foreseeability of the possibility of a death as satisfying the requirements of both *Enmund* and our capital punishment statute that a defendant actually intend a killing or knowingly acquiesce in one.